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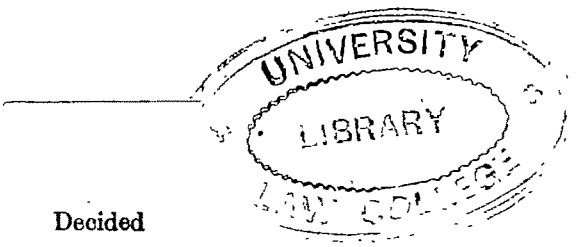

Decided

BY THE SUPREME COURT OF INDIA

AND

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Vol. 93

(January to June)

1954

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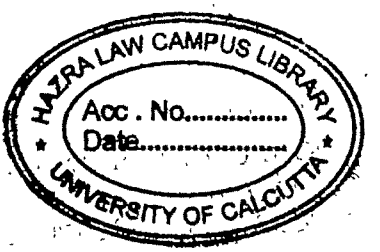
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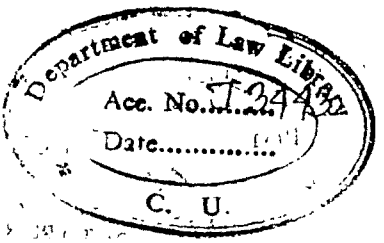
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ORIGINAL CIVIL.

Before Mr. Justice P. B. Mukharji.

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1953.

April, 1.

HOUSE LIMITED AGENCY.

v.

PAINT & LACQUERS LTD.*

Partnership—Suit against third party instituted in firm name by a single partner—Application by majority of partners to take the plaint off the file—Whether such an application is maintainable—Remedies that are open.

The essence of partnership is that all should act together and if they cannot the majority should prevail. To hold otherwise will mean that it is not a partnership but the dictatorship of one of the partners.

It will be a wholly unwarrantable aberration of the law of partnership and its procedure to allow a partner who chooses to continue as a partner and not to retire as in the partnership agreement or to dissolve the partnership to have the privilege of a partner of using the name of the firm as a plaintiff in litigation and at the same time to defy and break the express contract of partnership.

In the absence of allegation of any fraud or collusion as between the majority of partners and the defendant, sub-clause (c) and (d) of Section 19(2) of the Indian Partnership Act cannot be interpreted to mean a prohibition on the majority of partners to act under Section 12 (c) of the Act and under an express contract of partnership providing that in case of any difference their opinion shall prevail, and so to discontinue the suit initiated by one partner in the name of the firm without the consent and against the wishes of all other partners.

The practice of staying the suit in such case would mean serious disadvantage of the defendant who is in no way responsible for this internecine quarrels of the partners. From this point of view the better course would be to order the plaint to be taken off the file and if thereby the partnership

* Application on a Chamber summons to withdraw Suit No. 2765 of 1952.

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suffers any loss in the matter of the recovery of its dues, the disappointed partner can be left to his remedy under the contract of partnership and under the partnership law either to sue for dissolution or for retirement with a claim for the loss if such there be due to the wilful misconduct of the other partners.

An indemnity for costs by the suing partner is not necessarily an adequate compensation to allow the action to proceed. If the partners by their very contract of partnership have stipulated that the opinion of the majority shall prevail then in my view the action should not be allowed to proceed.

Application by majority of partners to take the plaint off the file.

Suit by a single partner in the firm name against a third party for recovery of dues.

The material facts will appear from the judgment.

The judgment of the Court was as follows:—

P. B. Mukharji, J.:—This is plaintiff's application on a Chamber Summons to take the plaint off the file or alternatively to withdraw the suit with liberty to institute a fresh suit or in the further alternative to stay the suit.

The application is from many points of view a peculiar one.

The suit was filed by the House Limited agency described as a registered firm as the plaintiff. The verification in the plaint is by Makhan Lal Samaddar a partner of the plaintiff firm. The plaint is also signed by the said partner Makhan Lal Samaddar. Makhan Lal Samaddar is admittedly a partner.

The present applicants calling themselves also as plaintiffs are the other partners of the same plaintiff firm. The partners of the plaintiff firm are Makhan Lal Samaddar, Sm. Ramala Sarkar, Birendra Kumar Mitra, Sm. Karmarani Bose and Hari

Sankar Dutt. The Articles of Partnership are contained in a Deed dated the 8th December, 1948. The suit was instituted on or about the 10th July, 1952. The claim in this suit is against a defendant Company by the name Paints Lacquers Ltd. for the recovery of different sums of money like Rs. 26,621-11-0 and other smaller sums like Rs. 2,025/- Rs. 6,178-12-0, Rs. 15,000/- and Rs. 1,599-4-9. The smaller sums are said to be due by way of allowance to the plaintiff firm as Managing Agents of the defendant Company and for commission.

The present application is signed and verified by Birendra Kumar Mitra one of the partners of the plaintiff firm.

In the petition the main case is made on the ground that the majority of the partners consider that the suit is bound to fail and was instituted by Makhan Lal Samaddar without any justification or authority and without consulting the other partners. This is supported by a Resolution of the plaintiff firm in a meeting held on the 28th July 1952 and attended by all the partners except Makhan Lal Samaddar who did not attend the meeting inspite of notice. The minutes of the meeting reveal that Makhan Lal Samaddar voluntarily resigned on the 9th January 1951 from the duties of the plaintiff's day to day administration of the agency business as from the 12th January, 1951. This in fact is corroborated by a letter written by Makhan Lal Samaddar dated the 9th January, 1951, and set out in paragraph 6 of the petition. This letter is not disputed. The Resolution proceeds to state that the partner Birendra Kumar Mitra was thereafter entrusted with the day to day administration in place of Makhan Lal Samaddar and that inspite of this Makhan Lal Samaddar has now chosen to use the name of the firm to launch this litigation. The Resolution further states the fact that the plaintiff firm never demanded payment of the alleged dues on which the suit has now been filed by Samaddar. In fact it was resolved in that meeting that in the best interest of the plaintiff firm and the defendant company the outstanding dues of the firm as settled and worked out by Birendra Kumar Mitra and the Company would be realised in instalments and the defendant Company would be at liberty to pay the agreed sum within a period of three years from that date in equal annual instalments the first of such instalments being payable

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on or before the 30th June next and the two subsequent payments within 30th June, 1954 and 1955."

Both in the Minutes of this meeting as well as in the petition there are serious allegations against Makhan Lal Samaddar and it is alleged that he has been instrumental in launching different suits and proceedings in different Courts and in the name of others.

The question now before the Court is whether a suit instituted in the name of the plaintiff firm by one partner can be taken off the file or stayed by a majority of other partners in the plaintiff firm.

Before proceeding to discuss the law attention to one more fact is necessary and that is to the specific clause 24 of the Articles of Partnership which provides:

> "In case of difference of opinion at any time during the continuance of the partnership the opinion of the majority shall prevail."

Order 30 of the Code of Civil Procedure makes provisions for suits by or against firms. Rule 1 of Order 30 provides that any two or more persons claiming as partners may sue in the name of the firm of which such persons are partners at the time of the accruing of the cause of action. It has however been observed in the case of *Bhadreswar Coal Supply Company* v. *Satish* (1), that one partner can bring a suit in the firm name even when the other partners refuse to sue and in that event the other partners can ask for indemnity against costs from the suing partner. The question of other partners asking for the stay of suit except on indemnity was not strictly a point for decision in that case as the other partners did not take this objection but the defendant questioned the maintainability of the suit.

The provisions of the law of partnership with special reference to Indian Partnership Act may be examined in order to determine the question raised on this application. Section 19(2) (c) of the Indian Partnership Act provides that in the

(1) (1936) 40 C.W.N. 824.

absence of any usage or custom of trade to the contrary the implied authority of a partner does not empower him to compromise or relinquish any claim or portion of a claim by the firm. Similarly Section 19(2) (d) of the Act provides that there is no implied authority of a partner to withdraw a suit or proceeding filed on behalf of the firm. Learned counsel for Samaddar has relied on these sections of the Indian Partnership Act to support his argument that the other partners of the plaintiff firm should not be allowed to withdraw stay or relinquish or compromise the claim made in the suit. On a proper construction of these sections they do not in my opinion help the contention made on behalf of respondent Samaddar. Section 19 of the Partnership Act deals with the implied authority of a partner and is in Chapter IV of the Statute under the heading of "Relations of partners to third parties." The case before me is not the case where one single partner is compromising or relinquishing or withdrawing or staying any claim or proceeding. The question here is whether the majority of partners can do so, and the question here is not concerned with partners' relations with third parties, but with the relations of partners *inter se*. I find nothing in the Partnership Act which can be construed and regarded as a statutory prohibition of the course of action now asked by the majority of the partners in this case on the present application.

On this question it has been argued that the provisions in Section 19(2) (c) and (d) of the Indian Partnership Act are a departure from the English Law on the point and reliance has been placed on the footnote in Sir Dinshaw Mulla's Commentary on the Indian Partnership Act of 1934 criticising Lindley's observation, to which I will presently make a reference. But before I do so a common sense view of the problem presented on this application apart from the gloss of any authorities, will help to dispel many vague ideas on the subject.

I see no prospect of success for this suit, if for instance the defendant company calls all the majority of the partners of the plaintiff firm at the trial to depose against Makhan Lal Samaddar and to prove the agreement which I have set out and which is contained in the Minutes of the partners' meeting on the 28th July, 1952. Learned counsel appearing for Makhan Lal

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Samaddar in this application has argued that it will be at the trial for the Court to determine whether it will accept the evidence of Makhan Lal Samaddar or the evidence of other partners on this point. But then it is a foregone conclusion. I do not see how the Court can refuse to accept the evidence of the majority of the partners contained in the written minutes of the meeting attended by all the partners except the suing partner and which fact is not disputed. In fact the essence of a partnership is that all should act together and if they cannot the majority should prevail. To hold otherwise will mean that it is not a partnership but the dictatorship of one of the partners. The specific clause in the partnership agreement in this case also expressly says that in case of any difference of opinion at any time during the continuance of the partnership the opinion of the majority shall prevail. In this case while the partnership continues there is difference of opinion whether this suit should be continued or not and I see nothing illegal in the court upholding the express terms of the partnership contract. It will be in my view a wholly unwarrantable aberration of the law of partnership and its procedure as I understand them to allow a partner who chooses to continue as a partner and not to retire as in this partnership agreement or to dissolve the partnership, to have the privilege of a partner of using the name of the firm as a plaintiff in litigation and at the same time to defy and break the express contract of partnership.

In fact this is not quite an unknown situation in partnership law where one partner commences an action in the name of the firm against the expressed wishes of other co-partners and the procedure adopted by courts has been to stay the action until the partner bringing the action has given his co-partners a full indemnity coupled with security against all costs charges or liability by reason thereof. The Annual Practice in Notes under Order 48(a) Rule 1 of R.S.C. mentions the case of *Davy & Co.* v. *Alby United Carbide Factories Ltd.* (1). This case is not reported, but it is said that it referred to the case of *Seal & Edgelow* v. *Kingston* (2). Sir Gorell Barnes President delivering judgment observes at page 582 of that decision.

(1) Unreported judgment of Coleridge J. in Chambers dated the 19th March, 1914.

(2) [1908] 2 K.B. 579.

"It is clear upon the authority of *Whitehead* v. *Hughes* (1), that Seal had the right as one of the partners in the firm to use the name of the other partner for the purpose of bringing an action to recover a debt due to the firm on giving his partners indemnity against costs. As was said by Bailey B. in the case referred to one of several partners has a clear right to use the name of the other partners. If they object to their names being used, they may apply for an indemnity against the costs to which they might be subjected by the use of their names."

On this point reference may also be made to the decision of the English Court of Appeal in *Johnson* v. *Stephens & Carter Ltd.* (2), where Atkin, L.J. speaks with approval of the principle of indemnity as condition precedent as a general rule with the exception of the case where the dissenting partner has in breach of his duty to the plaintiff colluded with the defendant and brought about the breach complained of. With particular reference to the case of *Whitehead* v. *Hughes* (1), and the observations of Baley B, Atkin, L.J. said "I do not think it necessary to consider whether that case is law now, whether that is to say, one partner can use his co-partner's name as plaintiff against his will."

The Eleventh edition of Lindley's famous work on partnership lays down not only the principle of permitting the suing partners to continue the action by giving indemnity to the non-suing and non-cooperating partners in the action in the name of the firm but also the practice of staying such an action. In the words of the Editors of the eleventh edition of Lindley's Partnership the law is stated in these terms at p. 354:

"But if it is competent to one partner to sue for the firm, it is as competent to any other partner to stay proceedings, or to put an end to the action altogether by means of a release; and, although the Court will not allow this to be done by collusion with the defendant, for the purpose of defrauding the other partners of their rights (see ante, pp. 209, 210), a release will be effectual where there is no fraud in the case.

(1) (1834) 2 C. & M. 818. (2) [1923] 2 K.B. 857.

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"In *Harwood* v. *Edwards* (1), one of three partners, ners, without the knowledge or consent of the other two, brought an action in his name and theirs for the recovery of a debt due to the firm. The other two afterwards agreed with the defendant that proceedings should be stayed: and the Court held that this agreement bound all three; and proceedings were stayed accordingly, although the partner who promoted the action disputed the validity of the agreement, and, by the partnership articles, it had been agreed between the partners that one of them should not give a release without the assent of the others."

In the present case before me there is no allegation of any fraud or collusion as between the majority of the partners and the defendant company. So far as sub-clauses (c) and (d) of Section 19(2) of the Indian Partnership Act are concerned it is clear in this country that there is no implied authority any more after this Statute, for one partner to compromise or relinquish any claim by the firm or to withdraw a suit or proceeding filed on behalf of the firm. To that extent the observations just quoted from Lindley are not applicable in India. But then as I have said before that sub-clause (c) and (d) of Section 19(2) of the Indian Partnership Act cannot be interpreted to mean a prohibition on the majority of partners to act under Section 12(c) of the Partnership Act and under an express contract of partnership providing that in case of any difference their opinion shall prevail, and so to discontinue the suit initiated by one partner in the name of the firm without the consent and against the wishes of all other partners.

The practice of staying the action in such cases raises the question of how long the stay is to operate. Either it has to be a perpetual stay or a perpetual injunction restraining the suing partner from prosecuting his action in the name of the firm or the stay has to be limited to such time as the suing partner furnishes the indemnity and security and decided cases are silent on the point what happens if no security is furnished at all. Such a stay is in my view unfair to a defendant to the action because it places him indefinitely in a situation where the suit is kept pending against such defendant. I see no legal justification or principle by which a defendant should be made to suffer

(1) Gaw on Part. 65, note.

this situation for the internecine quarrels between the partners in an action where the firm is the plaintiff and for which internecine quarrels the defendant is in no way responsible. From that point of view I would much rather adopt the course of ordering the plaint to be taken off the file and if thereby the partnership suffers any loss in the matter of the recovery of its dues, the disappointed partner can be left to his remedy under the contract of partnership and under the partnership law either to sue for dissolution or for retirement as in this case with a claim for the loss if such there be due to the wilful misconduct of the other partners.

I do not consider that an indemnity for costs by the suing partner is necessarily an adequate compensation to allow the action to proceed. In the first instance it is unfair in my view and unjustifiable on principle to ask the majority of partners whose decision is by specific agreement said to prevail in any matter of difference should be reduced to the position of helpless onlookers in a suit which they not only disapprove but in which they say that the agreement with the defendant is such that is bound to defeat the suit. Then again it means that further proceedings will have to be taken which might mean a regular suit to enforce the indemnity given in this case by the suing partner. The costs for realising such an indemnity may be unrecoverable and I do not see why the partnership assets should be used to realise and enforce such indemnity. After all the firm or the partnership is not a legal entity like a corporation or a Joint Stock Company but is merely a compendious name for a group of persons called partners. If the majority of such partners by their very contract of partnership have stipulated that the opinion of the majority shall prevail then in my view the action should not be allowed to proceed.

It must be emphasised that by Section 18 of the Partnership Act it is distinctly laid down that the partner is an agent of the firm for the purposes of the business of the firm subject to the provisions of the Act. It is in my view a part of business of the firm to decide whether certain dues to the firm have become recoverable from third parties and whether such dues should be recovered by litigation. If therefore the suing partner's agency is denounced by the majority of the partners to sue on behalf of

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the firm then the action should not be allowed to proceed. Subject to contract between the parties, Section 12 of the Indian Partnership Act provides in sub-clause (c) that any difference arising as to the ordinary matters connected with the business may be decided by the majority of the partners. In my view whether an action should be brought to recover dues owing to the firm is ordinarily connected with the business of a firm. This majority principle is ingrained in the very nature of partnership apart from the specific agreement in the Articles of Partnership in this case.

To allow the suit to continue in these circumstances will be in my judgment to encourage abuse of the process of the court and the ends of justice demand that the suit should be discontinued. Under the inherent powers of the court under Section 151 of the Civil Procedure Code, I therefore direct and order that the plaint be taken off the file and the partner Makhan Lal Samaddar do pay the costs of this application to the present applicant and to the defendant. He will also pay the costs incurred up to date in this suit to the defendant company. All payments of costs as directed by this order will be paid by Makhan Lal Samaddar personally and not out of the partnership funds.

The application being on Chamber Summons is certified for counsel. A point was taken in the affidavit that the application should have been made on notice of motion but was not pressed before me. I need hardly add that although a Chamber Summons, it was listed with motions and heard in court and treated as a motion. Nevertheless I direct that the costs of this application be taxed as a Chamber Summons.

S.G.P. *Application allowed with costs.*

UNIVERSITY OF CALCUTTA
NOT TO BE REMOVED
DEPARTMENT OF LAW

CIVIL REVISION.

Before Mr. Justice G. N. Das and Mr. Justice J. P. Mitter.

Civil.

1953.

August, 24.

LAKHIKANTA GHOSE

v.

SURENDRA NATH GHOSE AND OTHERS.*

Court Fees Act (VII of 1870), Section 6—Joint application by two persons to sue as pauper—One held to be a pauper—Other not—Latter is to put in entire Court fees, if he wishes to proceed with the suit.

Where two persons file a joint application for leave to sue as paupers and one of them is held to be a pauper and the other is not, if the latter wants to proceed with the plaint as filed, under Section 6 of the Court Fees Act, he must put in the entire Court-fees payable on the plaint.

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Application under Section 115 of the Code of Civil Procedure and Article 227 of the Constitution of India by the Plaintiff No. 2.

Joint application by Plaintiffs 1 and 2 to sue as pauper.

The material fact will appear from the judgment.

Narendra Nath Chowdhury for the Petitioner.

Lala Hemanta Kumar and *Mohan Lal De* for the Opposite Parties.

The judgment of the Court was as follows:—

G. N. Das, J:—This is an application under Section 115 of the Code of Civil Procedure and Article 227 of the Constitution of India and is directed against an order, No. 23, dated the 30th of May, 1953, passed by Sri H. C. Ghose, learned Subordinate Judge, 1st Court, Hooghly.

* Civil Rule No. 1744 of 1953 against the order of Sri H. C. Ghose, the 1st Court of the Subordinate Judge, Hooghly (Chinsurah) passed in T. S. No. 14 of 1953, dated 30-5-53.

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1953.

Lakhikanta Ghose v. Surendra Nath Ghose & ors.

G. N. Das, J.

Plaintiff No. 1 Mahadeb Ghose, Opposite Party No. 11 in this Rule, and plaintiff No. 2, Lakhi Kanta Ghose, the petitioner in this Rule, filed a joint application for permission to sue as paupers. Along with the application they filed a copy of the proposed plaint alleging that the plaintiffs as reversioners were entitled to possession of the disputed property on the death of Benodini Dasi on the 28th of Jaistha, 1359 B.S. The plaintiffs prayed for declaration of their title and for recovery of possession. the claim being laid at Rs. 5,750/-.

The court thereupon made an enquiry into the pauperism of the two plaintiffs Mahadeb and Lakhi Kanta. By an order dated the 19th of March, 1953, the learned Subordinate Judge came to the conclusion that plaintiff No. 1 Mahadeb was a pauper but that Plaintiff No. 2, Lakhi Kanta, was not a pauper. On the 31st of March, 1953, Mahadeb's application was registered as a suit. On the 23rd of May 1953 an application was made by the contesting defendants, namely, opposite parties Nos. 1 to 11, praying for rejection of the plaint as the court-fees payable on the plaint had not been paid by Lakhi Kanta. On the 28th of May, 1953, Lakhi Kanta filed an application for amendment of the plaint to the effect that plaintiff No. 1, Mahadeb and PlaintiffNo. 2 Lakhi Kanta were equally interested in the disputed property and that the share of each of the two plaintiffs was -/8/- annas. Plaintiff No. 2 Lakhi Kanta expressed his willingness to pay half the Court fee payable on the plaint and to proceed with the suit. These two applications, one by the defendants and the other by Lakhi Kanta, were disposed of by the learned Subordinate Judge by order No. 23 dated the 30th of May 1953. The learned Subordinate Judge dismissed the defendants petition for rejection of the plaint but directed an amendment of the plaint to the effect that plaintiff No. 2 Lakhi Kanta had an -/8/- annas share in the disputed property. By the same order the learned Subordinate Judge directed Lakhi Kanta, plaintiff No. 2 to file a fresh suit for declaration of his -/8/- annas share in the disputed property on payment of costs of the application for leave to sue as a pauper and on payment of proper court-fees. It is against the last part of the order dated the 30th of May, 1953 that Lakhi Kanta moved this Court in revision and obtained the present Rule.

At the very outset I may point out that the order of the learned Subordinate Judge dated the 30th of May 1953, is not quite consistent in so far as the last two portions thereof are concerned. Be that as it may, I have to consider the propriety of that portion of the order which is now in question in this case.

Mr. Chowdhury who has appeared in support of the petition has submitted that plaintiff No. 2 Lakhi Kanta is entitled to proceed with the suit on payment of an -/8/- annas share of the Court-fees payable on the plaint.

In a case where a person applies for permission to sue as a pauper and his application is dismissed under the provisions of Order XXXIII, Rule 7(3) of the Code of Civil Procedure on the ground that he is not a pauper, the law is well settled that the Court can permit the plaintiff to treat his application for permission to sue as a pauper as the plaint in the suit. There is, however a divergence of judicial opinion on the further question whether the plaint should be treated as having been presented on the date when the application for leave to sue as a pauper was filed or when the plaintiff, whose application to sue as a pauper was dismissed, puts in the costs incurred by the opposite party and pays the proper court-fee on the plaint. The latter view was taken by Edgley, J. in the case of *Biswanath Das* v. *Khejer Ali Molla* (1). The former view was taken by Guha and Bartley, JJ. in the case of *Jagadeeshwaree Debee* v. *Tinkarhi Bibi* (2), and by S. K. Ghose and patterson, JJ. in the case of *Kali Dasi* v. *Santosh Kr. Pal* (3).

In this case no question of limitation arises and as such the Court was entitled to treat the application for leave to sue as paupers filed by the two plaintiffs as the plaint in the suit, provided plaintiff No. 2 complied with the provisions of Order XXXIII Rule 15 of the Code of Civil Procedure. The question however is whether Lakhi Kanta, plaintiff No. 2 should be allowed to carry on the suit on payment of a moiety share of the court-fees payable or whether he is bound to pay the full court-fees on the plaint. The question depends on the terms of

(1) (1939) 42 C.W.N. 686.
(2) (1935) I.L.R. 62 Calc. 711.
(3) [1939] I.L.R. 1 Calc. 112.

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section 6 of the Court-fees Act and certain provisions contained in Order XXXIII of the Code of Civil Procedure Code. Section 6 of the Court-fees Act provides that a document of the description mentioned in schedules 1 and 2 of the Court-fees Act shall not be filed unless the Court-fees properly payable on such a document as provided for by the Act are paid. To this rule an exception is made by Order XXXIII Rule 8 of the Code of Civil Procedure. That rule provides that if an application for permission to sue as a pauper is granted, it shall be numbered and registered and shall be deemed to be the plaint in the suit and the suit shall proceed in all other respects as a suit instituted in the ordinary way except that the plaintiff shall not be liable to pay any court-fees on the plaint with certain exceptions mentioned in the rule. So far as plaintiff No. 1 is concerned, there is no question that he is entitled to carry on the suit without payment of proper court-fees. The question however is whether plaintiff No. 2, if he wants to continue the suit, should be called upon to pay court-fees and if so, for what amount. Section 6 of the Court-fees Act, to which I have already referred, clearly lays down that a document of the description referred to in Schedules 1 and 2 of the Court-fees Act, must be stamped with Court-fees payable under the Act. So far as plaintiff No. 2 is concerned, he does not enjoy the protection conferred by Order XXXIII, Rule 8 of the Code of Civil Procedure. He must therefore pay the court-fees required to be paid on the plaint under the Court-fees Act. The judicial decisions to which I have referred do not touch this question. It is of course open to plaintiff No. 2 when he finds that the Court has held that he is not pauper, to withdraw from the suit and file a fresh suit but if he wants to proceed with the plaint as filed, he must put in the proper court-fees leviable on the plaint, even though plaintiff No. 1, who has been declared to be a pauper is not required to do so. The exemption granted by Order XXXIII, Rule 8 is entirely personal and applies so far as the pauper is concerned. The rule does not entitle co-plaintiff who has been found not to be a pauper to take advantage of the provisions of Order XXXIII, Rule 8 of the Code of Civil Procedure. In my opinion therefore, if plaintiff No. 2 wants to carry on the suit as a co-plaintiff, he must pay the full court-fees payable on the plaint.

Mr. Chowdhury drew our attention to the provisions of Order XXXIII Rule 11 of the Code of Civil Procedure. The rule provides for a stage after the plaint has been registered as a suit under Order XXXIII Rule 8 and has therefore no application in the present case. The same remarks apply to the provisions of Order XXXIII Rule 11A which makes a similar provision where the suit abates on the death of one of the plaintiffs in that suit.

My conclusion therefore is that where two persons file a joint application for leave to sue as paupers and one of them is held to be a pauper and the other is not, if the latter wants to proceed with the suit, he must put in the entire court-fees payable on the plaint.

The result therefore is that this Rule is disposed of on the following terms. If plaintiff No. 2 Lakhi Kanta wants to proceed with the suit, he must pay the entire court-fees payable on the plaint within a time to be fixed by the Court below. If on the other hand, plaintiff No. 2 Lakhi Kanta wants to withdraw himself from this suit, he must comply with the provisions of Order XXXIII Rule 15 of the Code of Civil Procedure.

The Rule is disposed of accordingly but in the circumstances of the case there will be no order for costs.

J. P. Mitter, J:—I agree.

R.M. *Rule disposed of on terms.*

ORIGINAL CIVIL.

Before Mr. Justice D. N. Sinha.

CIVIL.

1953.

November, 27.

HAJI MD. VAKIL

v.

COMMISSIONER OF POLICE, CALCUTTA & ANR.*

Indian Arms Act (XI of 1878)—Section 18—Cancellation of Arms Licences—Valid grounds of cancellation—Reasons to be recorded in writing—Order of Cancellation must show that cancellation was necessary for "security of public peace."

The following things are essential to make an order under Section 18 of the Indian Arms Act valid:—

(1) The officer, authority, Magistrate or Commissioner, cancelling or suspending the licence, must have reasons for which he deems it necessary for the security of the public peace to cancel or suspend such licence.

(2) The person cancelling or suspending the licence must himself record the reasons in writing.

(3) The order on the face of it should show that—

(a) it was passed because it was necessary for the security of public peace to cancel or suspend such licence.

(b) that the reasons for thinking so have been recorded in writing by the person making the order.

The reasons for cancelling the licence may not be communicated but the licence holder has a right to know the reasons and if the order is challenged the Court has a right to look into it. If it is to be so recorded and kept back from the whole world, there is no point in recording it at all.

It is not necessary to give reasons with the minutest details if such a course is not in the public interest. But the licence holder is entitled to know broadly why his licence has been cancelled.

The order of cancellation of Arms licence must show on the face of it that it was passed because it was necessary for the security of public peace, otherwise the order becomes invalid.

* Matter No. 47 of 1953.

CIVIL.

1953.

Haji Md. Vakil
v.
Commissioner of Police, Calcutta

November, 27.

Application under Article 226 of the Constitution (mandamus) challenging the order of the Commissioner of Police, Calcutta, cancelling the Arms licence of the petitioner.

The material facts will appear from the judgment.

B. K. Ghose and R. L. Sinha for the Petitioner.

S. M. Bose, Advocate General and *Shankar Banerjee*, Standing Counsel for the Respondents.

The judgment of the Court was as follows:—

D. N. Sinha, J.:—The petitioner is a citizen of the Indian Union. In 1942, a license was issued to him in respect of a D.B.B.L. Gun by the District Magistrate of Ballia, U.P. In 1946, a fresh license was issued to him in respect thereof by the Commissioner of Police, Calcutta. In 1951, the petitioner applied for a license in respect of .32 bore revolver, and it was granted to him, by endorsement on his gun license.

On the 25th February 1952, the gun and revolver was taken away from the petitioner. On the 1st March 1952, the petitioner received the following communication from the respondent:

From

The Commissioner of Police,
Calcutta.

Janab H. Mohammad Vakil,
P-21, Ganesh Ch. Avenue,
Calcutta.

Dated 1st March, 1952.

By virtue of powers vested in me under section 18 of the Indian Arms Act, I hereby cancel your Arms license No. 18266-XVI (Calcutta) in respect of one 12 bore D.B.B.K. Gun No. 471E/15089 by Manlicher Schoensuer and one .32 bore revolver No. 7840 by Smith & Wesson.

I therefore advise you to arrange for immediate disposal of the said weapons and thirty six rounds of .32 bore revolver cartridges, now lying in deposit at this office.

Sd/- Illegible
Commissioner of Police.

Upon receipt of this communication, the petitioner addressed letter to the Chief Minister pointing out that no reasons had been assigned for the cancellation and asking for redress. A

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D. N. Sinha, J.

copy of this letter was sent to the Commissioner of Police. On the 25th April 1952, the petitioner addressed a letter to the respondent referring to the above letter and asked for information as to how the matter stood. On the 8th May 1952, the respondent asknowledged receipt of the said letter and informed the petitioner that intimation would be sent to him as soon as possible. On the 10th May 1952, the private Secretary to the Chief Minister informed the petitioner that his letter had been forwarded to the Secretary, Home (Police) Department, Writers' Buildings for disposal. On the 28th August 1952, the Assistant Secretary to the Government of West Bengal informed the petitioner that Government had considered his case carefully but regretted that they saw no reason to interfere with the decision of the Commissioner of Police, Calcutta. On the same day, the petitioner wrote to the respondent, referring to this letter and requested him to grant a fresh license. On the 19th November 1952, the respondent replied saying that the matter was receiving attention and further communication would follow.

On the expiry of 1952, the original license automatically have expired unless it was renewed.

On the 25/27 April 1953, the respondent informed the petitioner that the order dated 3rd March 1952 could not be reconsidered.

This rule was issued on the 13th May 1953.

Mr. Ghosh appearing on behalf of the petitioner argues that the order of cancellation is not in accordance with section 18 of the Indian Arms Act, 1878. The relevant provision stands as follows:—

"18 *Cancellation and Suspension of license.* Any license may be cancelled or suspended.

(a) By the officer by whom the same was granted, or by any authority to which he may be subordinate, or by any Magistrate of a District, or Commissioner of Police in a presidency town, within local limits of whose jurisdiction

the holder of such license may be, when, for reasons to be recorded in writing, such officer, authority, Magistrate or Commissioner deems it necessary for the security of the public peace to cancel or suspend such license . . . ."

Mr. Ghosh argues that the order of cancellation is bad because—

(1) The authority who granted the license and purported to cancel it did not record the reasons in writing.

(2) That the order does not show that the Commissioner deemed it necessary to cancel the license for security of the public peace.

Mr. Ghosh has relied on a decision of a division bench of the Allahabad High Court—*Seth Beni Chand* v. *The District Magistrate Banda & anr.* (1). Speaking of section 18 of the Indian Arms Act, the learned Judges held that the statute required two things. Firstly, that the authority suspending or cancelling a license must himself record the reasons why the order has been passed and secondly, that it should appear from the order that it was passed because it was necessary for the security of the public peace to do so.

If the letter dated the 1st March 1952, is the order of cancellation (it is not stated that there exists any other order) then on the face of it, neither the reasons have been recorded nor does it appear that it was passed because it was necessary for the security of the public peace to cancel the license.

The respondent however has filed an affidavit and says that the matter was considered by him and the Deputy Commissioner of Police then in charge and "it was deemed necessary by us for the security of the public peace to cancel the license of the petitioner for the gun and the revolver for reasons recorded in writing in the file." It is quite obvious that this statement is wholly inadequate since it does not say whether the reasons were recorded in writing by the respondent himself.

(1) [1953] A.L.J. 183.

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1953.

Haji Md. Vakil v. Commissioner of Police, Calcutta

D. N. Sinha, J.

The learned Advocate General took a point that the section did not require such reasons to be communicated to the license-holder. I asked the file to be produced to satisfy myself whether the respondent had actually recorded the reasons himself but the learned Advocate General frankly confessed that he had himself not been able to see it and it could not be produced in court.

Whether it is the duty of the officer cancelling a license to communicate the reasons recorded to the licence-holder, is a very difficult question. There is nothing in the section itself to say that the reasons recorded should be communicated. In my opinion however, the following things are essential to make an order under section 18 valid:

(1) The Officer, authority, magistrate or commissioner, cancelling or suspending the license, must have reasons for which he deems it necessary for the security of the public peace to cancel or suspend such license.

(2) The person cancelling or suspending the license must himself record the reasons in writing.

(3) The order on the face of it should show that:

(a) it was passed because it was necessary for the security of the public peace to cancel or suspend such licence.

(b) that the reason for thinking so have been recorded in writing by the person making the order.

I would not got to the extent of saying that the reasons must necessarily be communicated but I think that the licence-holder whose licence has been cancelled or suspended has a right to know the reasons and if the order is challenged the court has a right to look into it. Otherwise, I do not see the point in making it essential that reasons should be recorded in writing. If it is to be so recorded and kept back from the whole world, there is no point in recording it at all. The object in recording the reasons is obviously to give the licence-holder an opportunity

of knowing why such an extreme step had been taken. It is not necessary to give reasons with the minutest details if such a course is not in the public interest. But the licence-holder is entitled to know broadly why his licence has been cancelled. If the reasons are entirely withheld, the licence-holder would never be able to establish a case of mala-fides. Suppose in this case the respondent had cancelled the licence because of a frivolous reason or a reason which has not the slightest connection with security of the public peace. Such a cancellation could not stand for a moment. And yet, if the order of cancellation can be allowed to be so cryptic as in the present case, neither the licence-holder can challenge it, nor the court is in a position to say whether the order has complied with the provisions of law.

The order of cancellation in this case is plainly contained in the letter dated 1st March 1952, which says "I hereby cancel." This order does not show that it was passed because it was necessary for the security of the public peace to do so, nor does it say that any reasons exist for arriving at such a conclusion or that such reasons have been recorded in writing by the person cancelling the licence. It is stated in a subsequent affidavit that such reasons existed and were recorded in writing elsewhere, but not stated by whom. The order is plainly illegal and bad. The learned Advocate General next says that even if the order be bad, no order should be made now because the period for which the original licence was valid having expired, the application has become infructuous. In any event, he says that there has been inexcusable delay. It is true that it does not lie within the power of the Court to provide a fresh licence for the petitioner. But I do not agree with the proposition that the petitioner is not entitled to any relief. If the order of cancellation stands, he is prejudicated in two ways. Firstly, there is the ignominy of a charge that the petitioner is guilty of something which is prejudicial to the security of public peace and secondly his chances of procuring a fresh licence are greatly prejudiced if the cancellation of his licence is allowed to remain. Whether he will in fact be able to procure one, is not for this court to consider. It depends entirely upon the discretion of the respondent, exercised properly within the limits imposed by the provisions of the Indian Arms Act. As regards delay, I think that the petitioner was quite justified in moving the authorities before rush-

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ing to court. If the authorities had given an early refusal, it would have been all right. But even as late as November 1952, the matter was still under consideration and the final refusal came in the last week of April 1953. I do not think that there has been such a delay as to disentitle the petitioner from obtaining any relief.

The right order to make is the one made in the Allahabad case mentioned above, namely, quashing the order of cancellation dated 1st March 1952.

I however make it clear that I give no direction whatsoever as to the issue of any fresh licence.

The rule is made absolute, and the order of cancellation dated the 1st March 1952 is quashed.

I make no order as to costs.

S. N. Ghose: Solicitor for the Petitioner.

N. C. Mitra: Solicitor for the Respondents.

S.G.P. *Rule made absolute.*

CIVIL REVISION.

Before Sir Arthur Trevor Harries, Chief Justice and Mr. Justice G. N. Das.

BIRENDRA NATH BASAK & ORS.

v.

RABINDRA NATH MITTER & ORS.*

CIVIL.

1952.

May, 21.

West Bengal Premises Rent Control Act, 1950—Standardisation of rent—Rent fixed previously under Calcutta Rent Ordinance 1946—Further application for standardisation of rent under the Rent Control Act 1950—After the lapse of 3 years from the date of previous fixation of rent, the landlord is entitled to an increase over the rent previously fixed—Schedule A, para. 3, of the West Bengal Premises Rent Control Act 1950.

Where the rent of a premises had been fixed by the Rent Controller in 1947, and there was a further application for standardisation of rent under the West Bengal Premises Rent Control Act, 1950, and the landlord claimed an increase over the rent previously fixed, as laid down in para 3 of the Schedule A of the Rent Control Act of 1950:

Held: The landlord was entitled to claim an increase of 15% on the standard rent of Rs. 170/- fixed by the Rent Controller in 1947, after three years had elapsed from the date of the previous order.

Application for standardisation of rent.

The material facts will appear from the judgment.

Anil Kumar Sett for the Petitioners.

Surendra Nath Bose with Ramendra Nath Bose for the Opposite Parties.

The judgment of the Court was as follows:—

G. N. Das, J.:—This is an application in revision against an order of the Appellate Bench fixing standard rent. The

*Civil Rule No. 1709 of 1950 against the orders of the Judge, 5th Bench Court of Small Causes, Calcutta passed in Rent Appeal No. 1016 of 1950, dated 21st July, 1950 affirming that of the Additional Rent Controllers, Calcutta passed in cases No. 3881 of 1950, date 6th May, 1950.

CIVIL.

1952.

Birendra Nath Basak
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G. N. Das, J.

premises in question was let out on December 1, 1941 at a rent of Rs. 170/-. The rent was thereafter reduced to Rs. 150/- and in 1946 there was an application for standardisation of rent. On appeal to the Chief Judge the order of the Rent Controller standardising rent at Rs. 170/- was maintained. Thereafter the present application was filed by the tenant for standardising rent. The petitioners contained that the Appeal Bench and the Rent Controller have proceeded on the basis of the standard rent which was fixed in the proceedings started in 1946. Their grievance is that one of the petitioners who was a party to the application had died in the course of the proceedings and his heirs were not brought on the record. They therefore continued that the order made in the proceedings is not binding on them.

This contention is obviously unsound. This question was raised before the learned Chief Judge on a previous occasion and was overruled. Whether the decision is right or wrong, that decision binds the parties. The Rent Controller and the Appellate Court were right in basing their conclusions on the decision reached in the earlier proceedings.

It is next contended that as three years have now elapsed from the order fixing the standard rent on a previous occasion, the Court should give a direction that the landlords petitioners should be entittled to 15% increase in the standard rent of Rs. 170/-. When the matter was heard before the Rent Controller three years had not elapsed. The Rent Controller therefore rightly stated that the petitioner landlords would be entitled to an increase of 15% on the standard rent of Rs. 170/- after three years elapsed from the date of the order standardising the rent on May, 14, 1947. As the period of three years has since elapsed we think that to avoid further litigation the landlord petitioners may be held to be entitled to recover 15% increase on the old rent of Rs. 170/- on and from the expiration of three years from May 1947 i.e. from June, 1950.

The rule is accordingly disposed of as above.

I make no order as to costs.

Harries, C.J.:—I agree.

S.G.P. *Application partly allowed.*

ORIGINAL CIVIL.

Before Mr. Justice P. B. Mukharji.

A. S. SUBBA IYER

v.

METAL CORPORATION OF INDIA LTD.*

CIVIL.

1953.

September, 4.

Limitation—Article 182 of the Limitation Act—Appeal from the original decree extends limitations for execution—But appeal from the order rejecting an application for setting aside an ex parte decree does not extend the period of limitation for execution of decree.

The words "The final decree or order of the Appellate Court" in Art. 182(2) of the Limitation Act means the final decree or order passed on appeal from the decree which is sought to be executed and does not include the final decree or order that might be passed on appeal from an order made in a proceeding under Order 9 Rule 13 of the Civil Procedure Code, to have the decree which is sought to be executed set aside.

An appeal from an order rejecting an application to set aside on *ex parte* decree under Order 9 Rule 13 of the Civil Procedure Code does not extend the period of limitation for execution of the decree under Act 182(2) of the Limitation Act.

Application by the Plaintiff decree-holder for execution of the decree.

Objections by the Defendant judgment-debtor.

The material facts will appear from the judgment.

H. N. Ghosh for the Plaintiff decree-holder Petitioner.

S. K. Mukherji for the Defendant judgment-debtor Respondent.

The judgment of the Court was as follows:—

P. B. Mukharji, J.:—This is an interesting application in execution. It relates to the execution of the decree of the Madras City Civil Court transferred to this Court for execution. The important point raised is a point of limitation. The judgment-debtor contends that the decree is barred by limitation and cannot be executed.

* Execution Case No. 16 of 1953.

CIVIL.

1953.

A. S. Subba Iyer v. Metal Corporation of India Ltd.

P. B. Mukharji, J.

A few facts may be very briefly set out in order to appreciate the point involved. The City Civil Court at Madras passed on the 6th December, 1948, an *exparte* decree for Rs. 4,000/- with interest and costs in favour of the applicant. Towards the end of December, 1948, an application was made by the Judgment-debtor to the City Civil Court for setting aside the exparte decree. That was dismissed by the City Civil Court on the the 24th August, 1949. As against this order dismissing the application to set aside the *exparte* decree, the judgment-debtor appealed to the High Court at Madras on the 15th April, 1952. The High Court at Madras allowed the appeal conditionally on the defendant paying the decretal amount together with the costs of the appeal within two weeks after the date of reopening of the Court for Summer Vacation, i.e., some time in July, 1952, and in default the High Court ordered that the decree in suit was to be confirmed as per decree of the City Civil Court dated the 6th December, 1948 and 15th April, 1952. The defendant, however, failed to comply with the order of deposit. The result was that the City Civil Court decree stood confirmed. On the 20th April, 1953 by an order of the City Civil Court a certified copy of the decree of the City Court of Madras was sent to this Court for execution. The matter now comes up before me on a Tabular Statement affirmed on the 23rd June, 1953. It should be recorded that at no stage was there any stay of execution of the decree, obtained by the judgment-debtor.

Mr. S. K. Mukherjee, learned Council for the Judgment-debtor, contends that under Article 182 of the Limitation Act the City Civil Court decree being more than three years old, is barred.

Mr. H. N. Ghosh, learned Counsel appearing for the decree-holder, has very ably argued this matter to save his client from limitation. He has drawn my attention to the decisions of the Judicial Committee reported in *Nagendra Nath Dey* v. *Suresh Chandra Dey* (1), and in *Nanduri Sri Ramachandra Rao* v. *Chintamanibhatla Venkateswara Rao* (2), on the basis of which he argued that the word "appeal" in the third column of Article 182 of the Limitation Act should be read in its plain meaning without any qualification as pointed out by

(1) (1932) L.R. 59 I.A. 283. (2) [1939] A.I.R. Mad. 157.

the Judicial Committee. There is, however, the decision of Mr. Justice B. K. Mukherjee and Mr. Justice Sharpe reported in *Haris Chandra Chowdhury* v. *Dines Chandra Chowdhury* (1), which dissented from the Madras view expressed in *Nanduri Sriramachandra Rao's Case* (2), and came to the conclusion that the words "the final decree or order of the appellate court" in Art. 182(2) of the Limitation Act meant final decree or order passed on appeal from the decree which was sought to be executed and did not include the final decree or order that might be passed on appeal from an order made in a proceeding under Order 9 Rule 13 of the Civil Procedure Code, to have the decree which was sought to be executed set aside. In fact, it was held there that an appeal from an order rejecting an application to set aside *exparte* decree under Order 9 Rule 13 of the Civil Procedure Code did not extend the period of limitation for execution of the decree under Article 182(2) of the Limitation Act. Being a decision of the Division Bench of this Court, I prefer to follow the Bench decision in *Haris Chandra's Case* (1). Mr. Ghosh, however very ably turned the corner on this point by making a distinction. That distinction is subtle. Relying on the provisions of Sections 40 and 52 and order 21 Rule 9 of the Civil Procedure Code, Mr. Ghosh argued that whatever the Calcutta view may be as the decree in this case is a Madras decree. I as an executing Court should follow the Madras interpretation of Article 182(2) of the Limitation Act and not the Calcutta view on the ground that an executing Court although executes in the "manner" or according to the "Rules" of the place in which the executing Court is, it nevertheless adopts the substantive law of the Court in which the decree was passed. Having regard, therefore, to the decree of origin, Mr. Ghosh argued that I should follow and apply the principles laid down in *Nanduri Chandra's Case* (2). On this branch of his argument, he relied on the decisions reported in *Tincowrie Dawn* v. *Debendro Nath Mookerjee* (3), which was approved by a Division Bench of this Court in *Jogemaya Dassi* v. *Thackomoni Dassi* (4).

The main difficulty, however, in this case is that the Madras view expressed in *Nanduri Sriramachandra Rao's Case* (2), it itself

(1) [1946] A.I.R. Calc. 375. (2) [1939] A.I.R. Mad. 157.
(3) (1890) I.L.R. 17 Cal. 491.
(4) (1896) I.L.R. 24 Cal. 473 at pp. 490-91.

CIVIL.

1953.

A. S. Subba Iyer v. Metal Corporation of India Ltd.

P. B. Mukharji, J.

under a shadow. While therefore, I am inclined to agree on the second branch of Mr. Ghosh's argument that the right to execute the decree is a question belonging to the region of substantive law and that the executing court is more concerned with the adjectival law than with substantive law, that does not seem to help him. The recent Supreme Court decision reported in *Bhowanipore Banking Corporation Ltd.* v. *Gouri Shankar Sharma* (1), had occasion to observe in a proceeding under Order 9 Rule 9 of the Civil Procedure Code:—

> "This argument also is a highly far-fetched one, because the expression 'where there has been an appeal' must be read with the words in column 1 of Article 182, viz., 'for the execution of a decree or order of any civil court . . . . . ,' and however broadly we may construe it, it cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution."

Mr. Ghosh has pointed out that an order under Order 9 Rule 9 is a proceeding which had immediate connection with the decree itself. But I am afraid it is not open any more for this Court to go into that question after that decision of the Supreme Court that is expressed in that language. In fact, this decision of the Supreme Court was also understood in the same sense as I am doing at the present moment in the recent Full Bench decision of the Patna High Court reported in *Rameshwar Prasad Sahu* v. *Parmeshwar Prasad Sahu* (2). Delivering the Full Bench judgment, Shearer, J., observes at page 5 as follows:—

> "It is enough for me to say that I respectfully concur in the reasoning contained in the judgment of B. K. Mukharji, J. Mr. Nandlal Untwallia, for the respondents, has drawn our attention to a very recent decision of the Supreme Court which, he suggests, is conclusive on the point before us. In *Bhawanipore Banking Corporation Ltd.* v. *Gouri Shankar Sharma* (1), a final decree in a mortgage suit was passed on 22-12-1941. No attempt

(1) [1950] A.I.R. Sup. Ct. 6 at p. 7.
(2) [1951] A.I.R. Pat. 1.

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P. B. Mukharji, J.

was made to put the decree into execution until 9-4-1945. * * * * * Fazal Ali J. expressed the opinion that the application under Order 9, Rule 9 did not involve a review of the judgment thereby negativing the argument which commended itself to Courtney-Terrell, C.J. and went on to point out that the word 'appeal' in Cl. (2) of Art. 182 meant an appeal from the decree of which execution was sought, thereby affirming the series of decisions which Courtney-Terrell, C.J. had taken to have been impliedly over-ruled. The plea taken by Mr. Nandlal Untwallia for the respondents was, in my opinion, a sound one."

Having regard to that position in law, I am afraid I have to hold that this decree is barred by limitation under Article 182 of the Limitation Act. The application should, therefore, be dismissed. But I will make no order as to costs.

K. K. Khettry: Solicitor for the Plaintiff.

S. C. Bose & Co.: Solicitors for Defendant.

S.G.P. *Application dismissed.*

CRIMINAL REVISION.

Before Mr. Justice S. K. Sen and Mr. Justice J. P. Mitter.

CRIMINAL.

1953.

March, 12.

KRISHNA PADA BHAKTA & ORS.

v.

THE STATE.*

Criminal Procedure Code—Bar to Criminal prosecution—Section 403, C.P.C. —Accused once acquitted under Section 247, C.P.C.—Fresh prosecution on same set of facts for a different offence—Whether such prosecution is barred—"Distinct offence"—Whether former acquittal bars fresh prosecution when the allegations make out a "distinct offence"—If and when acquittal or conviction bars further prosecution—Section 235, 236 and 237 of the Criminal Procedure Code.

* Criminal Rev. No. 983 of 1952.

CRIMINAL.

1958.

Krishna Pada Bhakta v. The State.

February, 2.

When the offences are such as come within Section 236 or 237 of the Criminal Procedure Code, former acquittal or conviction by a Court of competent jurisdiction serves as a bar to any fresh prosecution on the same set of facts and Section 403(1) of the Criminal Procedure Code applies.

But when the offences are not such as come within the scope of Section 236 or 237 of the Criminal Procedure Code, but they are distinct offences committed in the course of the same transaction within the scope of Section 235(1) of the Criminal Procedure Code, a fresh trial is not barred because the case comes within Section 403(2) of the Code. Where a complaint filed discloses several offences and the accused is summoned for one of the offences and in default of the appearance of the complainant the accused is acquitted, a fresh complaint in respect of other distinct offences though arising on the same facts is not barred by virtue of Section 403(2) read with Section 235(1) of the Criminal Procedure Code.

Fazar Pramanik v. *King Emperor* (1) and *Sarada Devi* v. *Satyeswar Santra* (2), distinguished.

Accused convicted under Section 427 I.P.C.

Application for revision by the accused.

The material facts will appear from the order of reference and the judgment.

Bireswar Chatterjee for the Petitioners.

Sambhunath Banerjee and *Ganga Narayan Chandra* for the Complainant.

The following was the order of reference:—

K. C. Chunder, J.:—Having heard the learned Advocates on both sides it is apparent that there is a conflict of Division Bench decisions in this matter. As a single Judge, I am bound by both and in any case except by a Full Bench of this Court, the matter cannot be settled authoritatively. In the present case the petitioners were convicted of an offence under section 427 of the Indian Penal Code by a Magistrate, 1st Class of Serampore and sentenced to pay a fine of Rs. 25/-, in default, rigorous imprisonment for one month. There was also an order for compensation to the complainant. It appears that originally the

(1) (1922) 37 C.L.J. 253.
(2) [1935] A.I.R. Cal. 574.

complainant filed another petition of complaint with only one line wanting from the fresh petition of complaint filed later, on which the present conviction has been made. In that complainant the same facts were stated and the Magistrate issued processes under section 447 of the Indian Penal Code, then directed proceedings to go on after the accused had appeared. The complainant was absent and the Magistrate acquitted the accused under section 247 of the Criminal Procedure Code. As I have already said the complainant again filed an identical petition as before with only one line added. A fresh summons was issued under section 427 of the Indian Penal Code and the accused petitioners have been convicted. They have come up on revision urging that further proceeding was prevented by section 403 of the Code of Criminal Procedure. It appears that in a decision reported in *Bhupati Bhusan Mukherjee* v. *Amio Bhusan Mukherjee* (1), a Division Bench held that if the section under which the accused was summoned in the second case was the same section as in the first case then the bar of section 403 of the Code of Criminal Procedure applied. The same Bench in a decision reported in *Sardar Deyi* v. *Satyeswar Santra* (2), pointed out that there was no such bar if the section under which the accused was summoned was different although the facts were the same in the two petitions. According to the decision in *Sarder Deyi* v. *Satyeswar Santra* (2), as the sections under which accused were summoned are different in the two trials though the same facts are alleged there would be no bar under section 403. It appears that the Bench in 1935 did not pay any attention to two previous Division Bench decisions of this Court. The decision reported in *Fazar Pramanik* v. *King Emperor* (3), and in *Sukum Ram Koch* v. *Krishna Deb Sarma* (4), are against the view taken in 1935. In the decision reported in *Sukum Ram Koch* v. *Krishna Deb Sarma* (4), it does not appear whether the sections were different as facts are not stated but in *Fazar Pramanik* v. *King Emperor* (3), the accused was summoned originally under section 426 of the Indian Penal Code and then acquitted under section 247 of the Code Criminal Procedure and subsequently again he was put up on his trial on the same petition of complaint under section 379 of the Indian Penal

(1) (1935) I.L.R. 62 Calc. 1119.
(2) [1935] A.I.R. Cal. 571.
(3) (1922) 37 C.L.J. 253.
(4) (1928) 33 C.W.N. 260.

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Code and the Division Bench decided that the bar under section 403 of the Code of the Criminal Procedure applied. Therefore the distinctions sought to be made as regards the difference in the number of the sections is not at all a tenable difference.

I am therefore constrained to send the case up to a Division Bench to consider the question of referring to a Full Bench if necesary for final authoritative decision on the point, namely, which of the two decisions in *Fazar Pramanik* v. *King Emperor* (1), or *Sardar Deyi* v. *Satyeswar Santra* (2), have been correctly decided. It is necessary in this connection to point out that there are decisions of other High Courts which may have to be considered when the matter is finally decided.

The judgment of the Division Bench which heard the Reference was as follows:—

S. K. Sen, J.:—This revisional application arises from an order of Sri S. C. Mukherjee, Magistrate, 1st Class Serampore, convicting the petitioners in a summary trial under section 427 of the Indian Penal Code and sentencing each of them to pay a fine of Rs. 25/- in default to rigorous imprisonment for one month. There was an order for compensation of Rs. 50/- to be paid to the complainant.

The case of the complainant Barada Prosad Mete was that on the 9th Sravan 1358 B.S. corresponding to July, 1951, the accused petitioners Kristopada Bhakta *alias* Krishna Pado Bhakta, Mihirlal *alias* Misri Bhakta and Sarat Chandra Bhakta with other men numbering 12 to 13 forcibly cut the land of the complainant on the common boundary and dismantled the pillars which had been put on the boundary as a result of demarcation after a Civil suit, and amalgamated some of the complainant's land with their own land committing mischief to the extent of about Rs. 100/-. The defence case was that no such occurrence had taken place and that a false case had been filed out of enmity. The learned Magistrate accepted the prosecution case and convicted and sentenced the petitioners as described above.

In this revisional application the first point urged is that on the same facts there was a previous complaint by the complainant opposite party and the accused had been summoned under

(1) (1922) 37 C.L.J. 253. (2) [1935] A.I.R. Cal. 571.

section 447 of the Indian Penal Code but due to default of the complainant the accused petitioners had been acquitted under section 247 of the Criminal Procedure Code and that therefore the present proceedings were incompetent in view of section 403 of the Criminal Procedure Code. In support of this contention reference has been made to the case of *Fazar Pramanik* v. *King Emperor* (1). In that case the petitioner was originally summoned to answer a charge under section 426 of the Indian Penal Code. He was acquitted under section 247 of the Code of Criminal Procedure on the ground of absence of the complainant. On a fresh complaint the petitioner was summoned under section 379 of the Indian Penal Code. It was held that the fresh proceedings were barred under section 403 of the Criminal Procedure Code. Section 403(1) provides that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge might have been made under section 236 or for which he might have been convicted under section 237. Sub-section (2) of the same section provides that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1) of the Criminal Procedure Code. In the case of *Fazar Pramanik* v. *King Emperor* (1), it is clear that the case was considered as one coming within sub-section (1) of section 403. On the same facts it might be doubtful whether an offence under section 426 or 379 of the Indian Penal Code had been committed e.g., when standing crops were cut wrongfully from the land, and it is uncertain whether the crops were ripe or not. When the offences are not such as come within the scope of section 236 or 237 of the Criminal Code but they are distinct offences committed in the course of the same transaction within the scope of section 235(1) of the Criminal Procedure Code, a fresh trial is not barred because the case comes under sub-section (2) of section 403 of the Criminal Procedure Code. This point was explained in the case of *Sarada Devi* v. *Satyeswar Santra* (2). It was held that where a complaint filed disclosed several offence and the accused

(1) (1918) 37 C.L.J. 253.

(2) (1935) A.I.R. Cal. 571.

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was summoned for one of the offences and in default of the appearance of the complainant the accused was acquitted, a fresh complaint in respect of other offences though arising on the same facts was not barred. This case was one coming within sub-section (2) of section 403 taken with the bar of section 235(1). This principle was further affirmed in the Special Bench Case of *Jatindra Nath Gupta & Ors.* v. *Emperor* (1), and this was approved also by the Full Bench in the case of *Purnanada Das Gupta & Ors.* v. *Emperor* (2). Mr. Chatterjee appearing for the petitioners has referred to a recent ruling in the case of *Kanai Hizra* v. *Golap Hizra* (3), but this was also clearly a case under section 236 or 237 of the Criminal Procedure Code and was therefore one governed by sub-section (1) of section 403 of the Criminal Procedure Code. Mr. Chatterjee has also argued that the present case also really falls within the scope of section 236 or 237 of the Criminal Procedure Code, as the allegations were criminal trespass with the intention to commit a mischief and committing mischief. Even if it be conceded that it was a case of criminal trespass with the intention to commit mischief, the offence of mischief is a distinct offence arising from the same transaction and therefore the case is clearly one falling under section 235(1) and not under sections 236 or 237 of the Criminal Procelure Code, where it is merely doubtful which of several offences had been committed. Accordingly we find that the present proceeding was not barred under section 403 of the Criminal Procedure Code.

The only other point urged by Mr. Chatterjee in respect of the Rule is that the learned Magistrate did not discuss the defence evidence and therefore the judgment was not a proper judgment. It should be remembered however that the case was tried summarily and the sentences passed were not appealable. In such a case, the learned Magistrate was not required to write the judgment delivered but to give his reasons for the conviction briefly under section 263, Clause (h) of the Criminal Procedure Code. Mr. Chatterjee has argued that even in such a case, the defence evidence ought to be discussed, and in support of his contention he has referred to the ruling in the case of *In re: Govindam* (4), where it was held that although in a summary trial it was not necessary for the Magis-

(1) [1937] A.I.R. Cal. 99.
(2) [1939] A.I.R. Cal. 65.
(3) [1958] A.I.R. Cal. 197.
(4) [1942] A.I.R. Mad. 669.

trate to record what the prosecution witnesses actually said it was necessary for him in convicting the accused to give a brief statement of the reasons, and the statement of reasons should include at least a short summary of what the prosecution witnesses had stated, and if there was defence evidence it would be necessary for the Magistrate to say why he preferred the prosecution evidence. A perusal of the judgment of that case will show that what the trying Magistrates (trying Magistrats were a Bench of Magistrates) recorded was that the Magistrates had heard the evidence and unanimously found the accused guilty. There was no record of any evidence for the prosecution or defence and no statement of reasons. There was therefore clear non-compliance with the provisions of section 263 of the Criminal Procedure Code. In the present case the learned Magistrate recorded the prosecution and defence evidence separately although not in extenso and he wrote out a short judgment giving his reasons. Therefore there was compliance with the provisions of section 263 of the Criminal Procedure Code. It is true that the learned Magistrate did not in his brief judgment discuss what the defence witnesses had stated but a perusal of the judgment shows that he did consider what the defence witnesses had stated. For instance, he observes in the judgment that the evidence of both parties shows that the complainant's land stood at a higher level than the land of the accused. Moreover the evidence of the two defence witnesses in the case was only that the accused had not actually gone to the common boundary at the time alleged and had not cut the ail. This was a mere denial of the prosecution case. The learned Magistrate noted that the defence was a mere denial and that the case was false. It cannot be said therefore that the learned Magistrate failed to consider the defence case. Accordingly this point must also fail.

The application therefore fails and the Rule is discharged.

J. P. Mitter, J.:—I agree.

S.G.P. *Rule discharged.*

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee and Mr. Justice S. K. Sen.

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September, 9.

APCAR COLLIERIES LTD.

v.

RADHA GOBINDA RAY & ORS.*

Coinage—Rent fixed and described in terms of obsolete coins—Whether the land-lord can claim as rent its equivalent value in current coins.

Where in a Kabuliyat, the annual rent was fixed at and described as "Company's current sicca Rs. 5,039-8," though "Company's sicca rupee" was abolished long before the execution of the Kabuliyat, and later on the landlords claimed as rent the equivalent of "Company's sicca rupee" in current rupee, (i.e. more than Rs. 5,039-8 in current rupee), and it was proved that the record-of-rights shows the rent as Rs. 5,039-8 per annum and the actual rent paid since the execution of the Kabuliyat was always Rs. 5,039-8 in current coins:

Held:—Considering the facts, that the "Company's sicca rupee" had been abolished long before the execution of the Kabuliyat and that the C. S. Khaitan shows the Jama as "Rs. 5,039-8 per annum," and also that the landlords, prior to the suit, realised rent at the rate of Rs. 5,039-8 in current coins the monetary unit referred to in the Kabuliyat means the current coins at the date of the Kabuliyat, that is the Company's rupee and not the sicca rupee.

Appeal by the Defendant tenant. Suit for arrears of rent and interest.

The material facts will appear from the judgment.

Sitaram Banerjee and Nanda Gopal Banerjee for the Appellant.

Dr. N. C. Sen Gupta and *Jagadish Chandra Ghosh* for the Respondents.

The judgment of the Court was as follows:

* Appeal from Original Decree No. 165 of 1948 against the decree of Sri Abani Bhusan Ganguly, Sub-Judge, Zillah Burdwan at Asansol, dated 2nd September, 1948, in Money Suit No. 11 of 1948 dated 21st of May, 1948.

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P. N. Mookerjee, J.:—Three-quarters of a century back, on or about the 20th August, 1878, the appellants' predecessors took permanent settlement of the underground rights in the lands in suit from the respondents predecessors. The relevant kabuliyat which was described as a "Mokrari Taluka Kabuliyat" was duly registered in accordance with law and a certified copy thereof is Ext. 1 in the present case. It appears from the kabuliyat Ext. 1 that the lessees had also certain rights in the corresponding surface land. A salami of Rs. 5,039-8 was paid at the time of the settlement and the annual rent or jama was fixed at "Company's current Sicca Rs. 5,039-8." This total rent was mentioned in the schedule of the Kabuliyat as "Rs. 5,039-8" and was payable in eleven kists or instalments of Rs. 420/- each in each of the months of Bhadra to Asar of each Bengali year and a twelfth monthly kist or instalment of Rs. 419-8 in Sraban following. The lessees stipulated for themselves and their heirs to pay the lessors and their heirs "the fixed rent, year after year, month after month, according to the kists" stated above, with a further stipulation that "on failure of the kists, we shall pay interest according to law and we shall pay the rent by the 30th Chaitra, the close of the year," and "on failure to do so, you shall bring a suit for arrears of rent." There is no dispute that the appellants, the Apcar Collieries Limited, are the present tenants, and the respondent No. 1, Radhagobind Roy, and the other respondents are the present landlords; nor is there any dispute that the tenancy is held on the stipulations, as contained in Ext. 1 to the relevant terms whereof reference has already been made. It is also undisputed that in the C. S. Khaitan published several years ago the jama was recorded as "Rs. 5,039-8 per annum."

The relationship between the parties appears to have been fairly cordial for over half a century. But then trouble started near about 1935-36 over, presumably, the payment of cess, and sometimes in the year, 1938, the matter came to court in Rent Suit No. 4 of 1938 before the Subordinate Judge of Asansol at the instance of the plaintiffs-landlords. The landlord's claim for cess was disallowed by the learned trial judge, but on appeal to this Cout (F.A. 9 of 1939), that decision was reversed and the matter was sent back for re-consideration in the light of certain directions given in the appellate judgment. At the re-hearing also, the plaintiffs failed to get any relief and the appeal that

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followed, viz., F.A. 134 of 1943, also proved unsuccessful. These proceedings terminated sometime in May 1843. But fresh disputes cropped up between the parties, this time with regard to the amount of the annual rent, payable under the kabuliyat Ext. 1, and the payment of interest as stipulated therein, and the result was the present suit (M.S. No. II of 1946) which was instituted by the plaintiffs-landlords against the tenant-defendant, the appellant Company, the Apcar Collieries Limited, before the learned Subordinate Judge at Asansol on the 15th April, 1946.

In the suit, the plaintiffs laid their claim for rent on the basis of Rs. 5,375-7-9 gds., 1 kara and 1 karanti per annum, their case being that, under the kabuliyat Ext. 1, the annual jama was Rs. 5,039-8 in sicca coins equivalent to the above figure of Rs. 5,375-7-9 gds., 1 kara and 1 karanti in current coins, and they also claimed interest at the legal rate, as provided in the said kabuliyat Ext. 1 on account of the defendant's default in the payment of the rent kists, as mentioned therein, the rate of interest, claimed in the plaint being Re. 1/- per cent per month. The defendant company contested the suit and in their written statement they denied that the rent was as claimed by the plaintiffs and they also repudiated the plaintiffs claim for interest. According to their defence, the rent was Rs. 5,039-8 per annum in "current coin of the realm" under the kabuliyat Ext. 1, and "not in sicca coin which was not in use at all at the time when the lease (in question) was executed and, with regard to interest, the averment was that there was no default on the Company's part in the payment of rent, but that the rent had remained unpaid due to wrongful refusal on the plaintiffs' part to accept the same.

On the above pleadings, the two questions which really arose for consideration in the suit were:

(1) What was the annual rent? Was it Rs. 5,039-8 in current coins or was it the same figure in sicca coins, equivalent to Rs. 5,375-7-9 gds. 1 kara 1 karanti in current coins?

(2) Whether, in the circumstances of this case, the defendant Company had become liable to pay interest as provided in the kabuliyat Ext. 1?

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Both the above questions have been answered by the learned Subordinate Judge in the plaintiffs favour. On an interpretation of the kabuliyat Ext. 1, he has held that the rent was mentioned there in sicca rupees or in other words, that the rent was Rs. 5,039-8 sicca equivalent to Rs. 5,375-7-9 gds. 1 kara 1 karanti in current coins. The learned Judge also allowed the plaintiffs' claim for interest. Hence this appeal by the defendant.

The question of interest does not require much discussion. There is hardly anything to be said against the learned Subordinate Judge's decision on this point. He has held that the plaintiffs are entitled to interest at the rate of 12 per cent per annum on the unpaid rent and his conclusion is certainly correct. The kabuliyat Ext. 1 shows that the tenant is liable to pay interest at the rate of Re. 1/- per cent. per month on the rent in arrears. That is not disputed. Nor is there dispute that the rent has actually remained unpaid since 1349 B.S. Admittedly, also interest was decreed in the previous suit between the parties, viz., Rent Suit No. 4 of 1938, on this point of interest, the defendant's only case in their written statement was that they had duly offered or tendered their rent to the plaintiffs landlords, but that he latter had wrongfully refused to accept the same, and hence they were not entitled to interest. In evidence, however, there was no suggestion to the above effect to the plaintiffs Karma Chari, P.W. 1, during his cross-examination; nor was any such case put forward even by the defendant's Naib D.W. 1 who was their only witness. The only relevant statements made by this witness on this part of the case appear at p. 18 of part 1 of the Paper Book and they are as follows:

> "The rents were paid in Aswin and Chait, not monthly. Plaintiffs' men used to come to our office to receive payment. * * * * We are always ready to pay. Plaintiff's men did not come."

The first sentence cannot certainly prevail over the provision of monthly kists, contained in the kabuliyat, and it is, therefore, of no assistance to the defendant. The other lines quoted do not support the case of offer and tender and wrongful refusal, as made in the written statement, and as the liability to pay rent was undoubtedly of the defendant Company and the

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duty was clearly theirs to make the payment in time or to suffer the consequences of their default in the shape of the additional liability to pay the stipulated interest, the evidence, even if true, would not relieve the defendant of that liability. The learned Subordinate Judge was, therefore, right in rejecting the defence contention under this head, and allowing the plaintiffs interest at the kabuliyat rate. The appellants argument against this part of the learned Judge's decision is, therefore overruled.

On the other point, however, this appeal must succeed. In the record-of-rights, the rent is recorded as Rs. 5,039-8 obviously in current coins. This raises a presumption in the appellants favour. But this presumption may be rebutted by other evidence. For this purpose, the plaintiffs relied upon the kabuliyat Ext. 1. In the said Kabuliyat the annual rent is fixed at Rs. 5,039-8 annas in Company's current sicca"—কোম্পানীর চলন সিক্কা ৫০৩৯৷৷০" to quote the actual words used in the document. The kabuliyat Ext. 1 is dated the 20th August, 1878. Admittedly, no Company's sicca coin was then in use. This position is accepted by Dr. Sen Gupta who appears for the plaintiffs respondents, although he disputes the correctness of the statement in the case of *Maharaj Bahadur Singh* v. *Jadab Ch. Ghosh Hazra* (1), that there was no "Company's sicca coin" at any time. Tracing the history of coinage from the year 1773 when the "sicca rupee" was first introduced, Dr. Sen Gupta has contended that as this coin was struck for "the territories subject to the company, and eventually minted only at the Company's mint, although it came to be designated officially as the "sicca rupee" and latterly, as the 'Calcutta Sicca Rupee', when minted at Calcutta, it was also popularly known as the 'Company's Sicca Rupee or coin.' This submission of the learned Advocate may or may not be correct, but this the 'Calcutta Sicca Rupee or, for the matter of that, the Sicca Rupee"—even assuming that it was popularly known also as the 'company's sicca rupee or coin'—came to be finally abolished in or about 1838, or from 1st January, 1838, to be precise, (Vide Governor-General's Act XIII of 1836), its coinage having already ceased or become prohibited since about 1835 under Governor-General's Act XVII of 1835 which introduced the "Company's rupee" in its place, and, as thenceforth, that is, since

(1) (1918) I.L.R. 46 Cal. 347 (S.C.) 30 C.L.J. 246.

about 1838, the "Company's rupee became current as the only legal tender and remained so at the date of the kabuliyat Ext. 1 and was thus the Company's current coin on that date, the reference in the Kakuliyat to the "Company's current sicca rupee or coin" was at best ambiguous. It might mean—and this seems to be its proper meaning—the Company's current coin, that is, the Company's rupee' which was then inforce, the word "sicca" being rather loosely used, or, being possibly just a loose expression, to denote a 'stamped coin' or the authorised coin of the realm, or it might mean,—although this meaning does not seem to be quite happy or opposite,—the 'Calcutta Sicca rupee',—popularly known also, as submitted by Dr. Sen Gupta —assuming that submission to be correct,—as the 'Company's Sicca rupee or coin' which was in vogue or use before, the word "Current" meaning, though not very appropriately, "which was current" that is, "current at that past period." The expression, used in the Kabuliyat Ext. 1) to, denote the unit of payment in the matter of rent, namely "কোম্পানীর চলন সিক্কা ৫০৩৷ আঃ টা" (Company's current sicca rupee or coin") is thus at best ambiguous, even upon the most favourable view of the plaintiffs case on the point, the reference being either to the old 'Sicca, rupee or coin, or, to the current rupee or coin in use or vogue at the date of the document (Ext. 1) that is, the "Company's rupee" or the present rupee or coin and, that being so, extrinsic evidence is admissible to prove which of the two coins was really meant. It seems to me, therefore, that the learned Subordinate Judge was not right in ruling out such evidence on this point, and his approach, therefore, to the issue before him was not correct.

The extrinsic evidence which would be relevant and admissible to resolve the ambiguity, I have pointed out above, may be furnished by surrounding circumstances and contemporaneous or subsequent conduct of the parties. There is no direct evidence of any surrounding circumstance except that the sicca coin had ceased to be in force or to be legal tender long before the date of the lease or kabuliyat, Ext. 1; nor is there any direct evidence of any contemporaneous conduct which would furnish any definite clue in the matter. But as to subsequent conduct of the parties, the evidence is decidedly in the defendants favour (vide previous Rent suit papers, viz., Exts. A.B.B. (1) C and C (1) and the deposition of the two witnesses P.W. 1 and D.W. 1) and

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it points unmistakably to demand and realisation of rent by the plaintiffs at the rate of Rs. 5,039-8 in current coins and when this evidence is read along with the admitted case of realisation of rents on the basis of the entry in the record-of-rights, to which reference has been made above, and the pleadings of the parties, the inference is fairly deducible that, all along, from the beginning of the tenancy in suit, rent had been paid and received at that rate.

Much was sought to be made of the non-production of the defendants records or papers to show payment of rent at the rate of Rs. 5,039-8 in current coins. But these were not called for from the defendant and the plaintiffs also have not produced their own papers relating to realisation of the rent. No adverse inference should, therefore, drawn against the defendants appellants from the non-production of their records.

It thus appears that the extrinsic evidence overwhelmingly leads to the conclusion that the monetary unit, referred to in the Kabuliyat Ext. 1 in relation to the rent, was the current coin at the date of the said Kabuliyat, that is the Company's repee and not the sicca rupee, and the kabuliyat Ext. 1 thus supports the entry in the record of rights and confirms its correctness, and far from rebutting the presumption, it distinctly aids the same. I hold therefore, that the disputed rent is Rs. 5,039-8 in current coin and not in sicca rupee and the learned Judge's interpretation of the kabuliyat Ext. 1 on this point and his finding to the contrary were wrong.

The decree for rent passed by the learned Subordinate Judge must therefore, be varied by allowing annual rent at the rate of Rs. 5,039-8 in current coins instead of Rs. 5,375-7-9 gds. 1 kara 1 karanti, as claimed by the plaintiffs and found by the learned Subordinate Judge and the decree for Interest passed by the learned Judge, will also be modified accordingly.

In the result, this appeal succeeds in part. The judgment and decree passed by the learned Subordinate Judge, is modified by reducing the rate of rent to Rs. 5,039-8 per annum from Rs. 5,375-7-9 gds. 1 kara 1 karanti, as allowed by the learned Judge, with corresponding reduction of the amount decreed by

him for interest the rate allowed by him in this respect, viz., 12 per cent per annum being however confirmed,—and corresponding variation of the decree for costs, passed by the learned trial Judge.

The appellants will have proportionate costs in his Court from the plaintiffs respondents the same to be set off against an equal amount of the latters decretal dues. The learned Subordinate Judge will draw up a fresh decree in the case in the light of this judgment.

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S. K. Sen, J.:—I agree. I should only like to add that in my opinion, taken in the light of the history of coinage in India, there is no ambiguity in interpreting the term "Company's Chalan or current sicca" used in the kabuliyat Ext. 1. The word "Chalan" or 'current' can only mean current at the time when the document was written and it cannot mean that which was curent at the time of the Company whose regime has ceased long before the execution of the document.

In the case cited by my learned brother in *Maharaj Bahadur Singh's Case* (1), there was no use of the term "Chalan" or "current" in the kabuliyat. There the stipulated rent was only described in terms of company's sicca coins. It was held by their lordships that the term "Company's sicca" was ambiguous, because there was no coin known as "Company's sicca." There were only Company's rupee which were minted in accordance with the Governor-General's Act XVII of 1835, and there were Calcutta sicca rupees which were sicca rupees in Calcutta before the 1st September, 1835, from which time Company's rupees came to be minted. Inspite of the absence of the term "chalan" or current in the Kabuliyat with which their lordships were concerned in *Maharaj Bahadur Singh's Case* (1), their lordships came to the conclusion that by the term "Company's sicca." Company's current coins were meant and the parties could not have remeant the non-current old coin, viz. Calcutta sicca rupee. In the present case, the use of the word "Chalan" or current, in my opinion, concludes the matter. The parties could only have meant current Company's coins and the word "sicca" must have been used loosely in the sense of stamped coin, as surmised by my learned brother. If the parties had really

(1) (1918) I.L.R. 46 Cal. 84; 30 C.L.J. 246.

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wanted to describe the stipulated rent in terms of the old coin which had ceased to be current for about half a century, they would have been careful to give its corresponding value in the coinage coin in the kabuliyat confirms the interpretation that the parties could only have meant current coin and the word "Sicca" was used loosely.

S.G.P. *Appeal partly allowed.*

APPEAL FROM ORIGINAL CIVIL.

Before Mr. P. B. Chakravartti, Chief Justice and Mr. Justice S. R. Das Gupta.

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1954.
January, 6.

SUDHANGSU BHATTACHARJEE
v.
RUPLEKHA PICTURES.*

Arbitration—Section 34 of the Arbitration Act—Application for stay of suit—Allegations of fraud against the plaintiff made in the application for stay—Whether the suit should be stayed—Public trial by the Court, best course in the face of serious allegations against the plaintiff.

When in an application under Section 34 of the Arbitration Act, the applicant makes serious allegations of fraud against the plaintiff, he thereby puts the reputation and character on his defence against serious charges. In such circumstances the Court will allow the plaintiff an opportunity to have his character vindicated at a public trial and not send him to a private tribunal with all the disadvantages incidental thereto.

The jurisdiction under Section 34 of the Indian Arbitration Act is only discretionary, because the Section says that the Court "may make an order staying the proceedings." In the face of serious allegations against the plaintiff, that discretion should not be exercised in favour of staying the proceedings, but should be exercised in favour of refusing stay.

Russell v. *Russell* (1), followed.

Appeal by the plaintiff.

*Appeal from Original Order No. 143 of 1952. (Award No. 153 of 1952.)

(1) (1880) L.R. 14 Ch.D. 471.

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Sudhangsu Bhattacharjee v. Ruplekha Pictures.

Chakravartti, C.J.

Application by the defendant for stay of suit under Section 34 of the Indian Arbitration Act.

The material facts will appear from the judgment.

A. C. Lahiri for the Appellant.

Ajoy Kumar Bose for the Respondent.

The judgment of the Court was as follows:—

Chakravartti, C.J.:—This appeal can be disposed of on a short ground. It is an appeal against a judgment and order of Mr. Justice Bachawat, dated the 27th of June, 1952, by which the learned Judge, acting under section 34 of the Indian Arbitration Act, directed further proceedings in a suit brought by the appellant to be stayed. He did so on the ground that the subject-matter of the suit lay within the ambit of an arbitration clause.

In view of the ground upon which we are going to base our decision, it is not necessary to state the facts at any great length. It will suffice to say that the appellant brought a suit for the recovery of a sum of Rs. 40,189-6-3 on the basis of an account stated which he annexed to his plaint. That account, according to him, had been signed and accepted on behalf of the respondent—firm by one of its partners. The plaint proceeded to state that the respondent-firm had failed and neglected to pay the amount or any part thereof in spite of demands and asked for a decree for the amount claimed as also the usual incidental reliefs.

It will be noticed that the suit, as laid in the plaint, is a suit based entirely on the acknowledgment of liability contained in the accounts stated and the promise to pay implied therein.

It is for a stay of that suit that the respondent firm made an application under section 34 of the Indian Arbitration Act. In paragraph 5 of the application it was stated that a suit had been brought "on the basis of the said Distribution Agreement referred hereinbefore," and the agreement set up is one dated 13th of August, 1949, more particularly described in paragraph 3 of the application. Except stating in general terms that the suit

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had been brought on the basis of the agreement, the respondent firm did not disclose what its defence to the claim would be or what dispute it wanted to raise. Reference was, however, made to an arbitration clause contained in the agreement which, so far as is material, provides that the parties have agreed "to settle all disputes and differences arising out of this agreement by reference to arbitration." To the application for stay a copy of the agreement was annexed.

The respondent firm annexed a further document to its application. That was a copy of an affidavit, said to have been affirmed by the appellant in connection with an intended application for a summary judgment in the suit under Chapter XIII A of the Rules of the Original Side, but, in fact, never used. That affidavit contains some reference to a statement of accounts in respect of expenses, advances and charges due to the appellant "from the 4th July 1949 to the 25th September 1950." It may be stated here that the statement of accounts annexed to the plaint is also a statement relating to the identical period.

In his affidavit-in-opposition, the appellant denied that his suit had been brought on the basis of the agreement and asserted that its basis was an independent agreement, dated the 7th October, 1950, which is the date of the statement of accounts. In the affidavit-in-reply, affirmed on behalf of the respondent-firm by one of its partners, a great many allegations were made against the appellant of which the following are relevant:

> "With reference to paragraph 3 of the said affidavit, I deny that there was ever any accounts stated in writing between the petitioner and the respondent Sudhangsu Bhattacharyya or that a sum of Rs. 40,189-6-3 was found due thereon. I challenge the genuineness of the statement annexed to the plaint. The entries therein are also false. A sum of Rs. 15,000/- has been shown to have been paid on Studio account but no such payment was made."

It is necessary to refer to the further allegations which may be summed up by saying that the respondent-fim characterised the appellant's claim as "wholly false and fictitious" and which included a reference to a cheque for Rs. 15,000/- said to have

been issued by him and said to have been dishonoured.

Section 34 of the Indian Arbitration Act requires the Court to see, when an application under the section is made, whether the plaintiff in the suit sought to be stayed is a party to the arbitration agreement pleaded; secondly, whether the person making the application is also a party to the said agreement and, thirdly, whether the suit is " in respect of any matter agreed to be referred." There is no dispute in the present case that the appellant and the respondent-firm are parties to the arbitration agreement set up by the latter. The only material question, therefore, is whether the appellant's suit was one concerning a matter which had been agreed to be referred to arbitration by the arbitration clause.

Mr. Justice Bachawat answered that question in the affirmative. He read the plaint along with the appellant's affidavit to which I have referred and came to the conclusion that all the items in the statement of accounts arose out of the contract of the 13th August, 1949. It may be stated here that by the terms of the contract, the plaintiff-appellant undertook to supply to the respondent-firm funds to the extent of Rs. 35,000/- in connection with the production of a film named "Abarta" and he was to be repaid out of the receipts derived from the exploitation of the pictures in certain areas contracted for. Mr. Justice Bachawat held that although the contract was dated the 13th August, 1949, and the period covered by the statement of accounts commenced on the 4th July preceding, yet there was nothing to show that the expenses included in the accounts had not been paid by the appellant after the conclusion of the agreement. He held that the appellant himself had stated in his affidavit that all the items of money included in the statement of accounts had been advanced in pursuance of the agreement and that being so, the learned Judge concluded that the dispute regarding the appellant's claim must be taken to have had its origin in the agreement. According to him, the statement of accounts did not contain an independent and separate agreement concluded on the 7th of October, 1950. He appears to have taken the view that although the effect of one of the partners of the respondent-firm signing the statement of accounts might be to create an acknowledgement of liability and also a promise to pay, it had

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still to be seen whether the appellant could claim payment except in the manner provided for in the contract, and that for the reason it would be necessary to construe the contract for the purpose of resolving the dispute between the parties. Accordingly, the learned Judge reached the conclusion that the dispute was one within the ambit of the wide words of the arbitration clause which were "arising out of the contract."

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Certain other matters are discussed by the learned Judge in his judgment, but it is not necessary to refer to them, as they were not canvassed before us.

On behalf of the appellant it has been argued by Mr. Lahiri that the learned Judge, who was dealing with an application under section 34 of the Indian Arbitration Act, had only to pay regard to the plaint by which the suit had been commenced and ascertain therefore the nature of its subject-matter. He was not entitled to travel beyond and to collect either from statements made by the respondent-firm or from statements made by the plaintiff himself elsewhere than in the plaint, what the subject-matter of the suit was. If attention was confined to the plaint, so the argument proceeded, the suit could only be regarded as a suit based on the statement of accounts and to refer to or depend on the contract in no way whatsoever. The contract had not even been mentioned and the appellant had elected to take his chance by suing the respondent-firm on the accounts stated and to stand or fall by his claim, as laid in his plaint. Whether he succeeded or failed, his suit could not be regarded as a suit "in respect of any matter agreed to be referred."

It was contended on the other hand by Mr. Basu that in whatever manner the plaint might have been framed, some reference to the contract was implicit in it, inasmuch as the statement of accounts contained a heading which referred to the film in regard to which a contract had been concluded between the parties. He referred us also to a clause contained in the contract which required the appellant to submit monthly statements on accounts to the respondent-firm and what he obviously intended to argue was that the accounts stated was nothing else than an account made up in pursuance of that clause in the contract. In any event, Mr. Basu proceeded, his client had

raised the question in his petition that the suit had been brought on the basis of the contract and, therefore, a construction of the contract in the suit was inevitable.

Had it been necessary to decide between these rival contentions of the parties, I would have to examine this part of the case in greater detail. *Prima facie* at least, it does appear that the suit was based purely on a statement of accounts and no reference to the contract would be necessary for the purpose of either decreeing or dismissing it. If accounts had been stated and if the statement had been signed on behalf of the respondent-firm, there was an acknowledgment of liability and a promise to pay which was sufficient cause of action, without more, for the purpose of supporting the suit. Section 34, the relevant part of which I have already quoted, does not refer to what the defendant says, but speaks only of legal proceedings commenced "in respect of any matter agreed to be referred." The reference appears to be to the constitution of the legal proceedings as laid in the plaint and if the plaint be the sole material to which attention must be confined, the present suit could in no way be said to involve any construction of or reference to the contract. There is, however, a reference to the film at the top of the statement of accounts and if the plaintiff's affidavit can at all be referred to, a question may arise as to whether a dispute regarding a liability, said to arise from a statement of accounts relating to advances made in pursuance of the agreement, is a dispute arising out of the contract, when the advances were being sought to be recovered by means of a straight claim in a suit instead of by the method for which the contract provided. I do not, however, consider, it necessary to deal further with this aspect of the case, because in my opinion a different ground is sufficient for its disposal.

I have already referred to the nature of some of the allegations made on behalf of the respondent-firm in its affidavit-in-reply. There, the firm was denying that any accounts had ever been stated in writing between it and the appellant. The clear insinuation in that statement is further emphasised or rather repeated bluntly when the affidavit proceeds to state that the declarant challenges the genuineness of the statement annexed to the plaint. In other words the affidavit is charging the appellant

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with having set up and trying to use as genuine a statement of accounts which was not a genuine document at all. The affidavit alleges further that the entries contained in the statement of accounts are false and that the appellant has shown therein a sum of Rs. 15,000/- as paid by him without paying it. Clearly, the affidavit is charging the appellant with having manufactured a false statement of accounts and with trying to use it as a genuine document in a Court of law and further with having made false entries in that account which he was putting forward as true. These allegations clearly put the character of the appellant in issue and put him on his defence against serious charges.

The principles which the Court has to follow when it finds such allegations made before it on an application for a stay of a suit were laid down by the great Master of the Rolls, Sir George Jessel, in the case of *Russell* v. *Russell* (1), and they have never been dissented from. It was observed in that case that where fraud was charged, the Court would in general refuse to send the dispute to arbitration if the party charged with the fraud desired a public enquiry. A distinction was made in respect of the case, where the party, charging the fraud, objected to arbitration, but that case may be left on one side as it is not the case here. With regard to the other case, namely, the case of a party charged with fraud objecting to arbitration, Jessel M. R. observed as follows:—

> "Where the party charged with the fraud desires it, I can perfectly understand the Court saying, 'I will not refer your character against your will to a private arbitrator.' It seems to me in that case it is almost a matter of course to refuse the reference."

To my mind, the principle applied by Sir George Jessel in *Russell* v. *Russell* (1), ought to apply in the present case. In the first place, to say the least, it is by no means clear that the suit is one in respect of a matter agreed to be referred. In the second place, there is a fairly substantial sum in the claim which is in excess of the amount covered by the contract. But the consideration which must overweigh all is that the respondent, by making allegations of a serious character, has put the reputation

(1) (1880) L.R. 14 Ch D. 471.

and the character of the appellant at stake and in such circumstances the Court will allow him an opportunity to have his character vindicated at a public trial and not send him to a private tribunal with all the disadvantages incidental thereto. The jurisdiction under section 34 of the Indian Arbitration Act is only discretionary, because the section only says that the Court "may make an order staying the proceedings." In my opinion, the present case is one where the discretion should not be exercised in favour of staying the proceedings, but should be exercised in favour of refusing stay. The attention of Mr. Justice Bachawat does not seem to have been drawn to this aspect of the case and the learned Judge had no occasion to apply his mind to it. In my opinion, this aspect of the case is crucial and the order I have proposed is the only order which the facts would justify.

In the result, this appeal is allowed, the judgment and order of Mr. Justice Bachawat, dated the 27th June, 1952, are set aside and the respondent's application under section 34 of the Indian Arbitration Act is dismissed.

The appellant will have his costs here and below.

Mr. Basu asks for three weeks' time within which his client may be allowed to file its written statement. The time prayed for is granted.

S. R. Das Gupta, J.:—I agree.

Roy Chowdhury & Co.: Solicitor for the Appellant.

S. C. Roy Chowdhury: Solicitor for the Respondent.

S.G.P. *Appeal allowed with costs.*

APPELLATE CIVIL.

Before Mr. Justice B. K. Guha.

MADANLAL BHANARANKA alias BHANERANKA

v.

RADHABALLAV PODDAR & ORS.*

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August, 28.

Calcutta Thika Tenancy Act 1949—Effects of the Amendment Act of 1953—Suit pending at the time of coming into operation of 1949 Act—whether in such cases tenants can claim the benefits of the Amending Act of 1953.

A plain reading of Section 5 of the Calcutta Thika Tenancy Act 1949 (as amended by the Act VI of 1953) seems to negative the idea that it is applicable only to suits instituted after 28-2-49. Section 5, as it stands now after the amendment, does not say in terms that it is to apply only to suits instituted after that date. On the contrary, the section is conclued in general terms making it applicable to all cases where a landlord wishes to eject a tenant.

A thika tenant is entitled to the benefits of the Amendment Act of 1953 even in cases where a suit for ejectment had been instituted against him before the 1949 Act came into existence but which was pending before the Act came into force... Had it not been the intention of the Legislature it would have spoken in clearer accents in the Amending Act.

Appeal by the Defendant Tenant.

Suit for Ejectment.

The material facts will appear from the judgment.

Binayak Banerjee and *Sudhir Kumar Acharjee* for the Appellant.

Narendra Nath Biswas for the Respondents.

The judgment of the Court was as follows:—

* Appeal from Appellate Decree No. 590 of 1952, against the decree of Sri A. N. Lahiri, Additional Subordinate Judge, Fourth Court of Zillah 24-Parganas at Alipore, in Title Appeal No. 595 of 1951 dated the 21st of April 1952, affirming the decree of Sri Sankar Prosad Chatterjee, Munsif third Court at Alipore, dated the 28th of May 1951.

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Madanlal Bhanaranka alias Bhaneranka v. Radhaballav Poddar & ors

B. K. Guha, J.

August, 28.

B. K. Guha, J.:—This appeal by the defendant arises out of a suit for ejectment and for recovery of damages. The appeal is being contested by the substituted respondents who purchased the disputed property during the pendency of the appeal in this Court. The original suit was filed before the Munsif, 3rd Court, Alipore on 28-3-48. The suit was decreed on contest on 28-5-51 and the defendant was directed to vacate the suit land within 90 days. Mesne profits were also decreed in favour of the plaintiffs. There was an appeal by the defendant before the District Judge and this appeal was heard by a Subordinate Judge, Alipore, who dismissed the same on 21-4-52. Thereupon the present appeal was preferred by the defendant before this Court on 16-5-52.

The plaintiff's case is briefly that the defendant is a thika monthly tenant whose tenancy has been determined by notice. The notice was purported to have been served on 2-1-48 requiring the defendant to vacate the premises on the expiry of the same month. The defence *inter alia* was that the defendant had constructed substantial structures on the land, that the notice was illegal and insufficient and that the plaintiffs had granted a 20 years lease in respect of the land in question. According to the defendant there was a registered agreement for a lease executed with the knowledge and consent of the plaintiffs. The defendant further set up a plea under section 53A of the Transfer of Property Act. The defence contentions were, however, negatived by both the courts below and the suit decreed in favour of the plaintiffs. The suit which had been filed, as stated before, on 23-2-48 before the Thika Tenancy Act, 1949 or, for the matter of that, Ordinance of 1948 came into operation, was tried by the learned Munsif according to the ordinary provisions of law and not under the provisions of the Thika Tenancy Act.

On behalf of the defendant-appellant Mr. Banerjee contends that by reason of the enactment of the Calcutta Thika Tenancy (Amendment) Act, 1953 which came into force on 14-3-53 during the pendency of this appeal the defendant is entitled to the benefit of the provisions of that Act. His contention is that even according to the admissions of the plaintiffs as contained in the plaint the defendant is clearly a Thika tenant according

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to the present definition of the term under the Thika Tenancy (Amendment) Act 1953. That this is so, that the defendant is a thika, tenant according to the present difinition is clear enough and it was also the case of the plaintiffs in the plaint that the defendant was a thika tenant. Mr. Banerjee has not challenged the findings of the Courts below regarding the other aspects of the case. He has contended, however, that the defendant-appellant is entitled to the benefit of the Thika Tenancy Act as amended and the argument before me relates only to ground No. 7 of the Memorandum of Appeal. That ground runs as follows:

> "For that it should have been alternatively held that the defendant was a Thika Tenant and the suit as framed was not maintainable and the notice was bad."

Mr. Banerjee contends that the result of the combined operation of Section 8 and the proviso to sub-section 2 of section 1 of the Thika Tenancy (Amendment) Act, 1953 is that the present Act is to be governed by Section 5 of the Original Thika Tenancy Act, 1949 (as amended by Act VI of 1953) and therefore as the case was not filed before the Thika Controller but before the Munsif the latter had no jurisdiction to try it and all that he could do was to return the plaint to the filing pleader for presentation to the Controller.

The next contention of Mr. Banerjee is that even if the learned Munsif had jurisdiction to try the suit be should have dismissed it because of non-compliance with section 3(4) of the 1949 Act as amended, first because the plaint simply averred that the landlord wanted khas possession of the land, that the landlord did not state specifically in the plaint that the land was required by the landlord for his own occupation or for the purpose of building on the land or otherwise developing the land by discontinuing letting of the land to Thika tenants nor was it stated that it was proposed to discontinue letting of the land to thika tenants. In other words, Mr. Banerjee's contention regarding this aspect of the case is that the, requirement for khas possession is not identical with requirement "for his own occupation" and, moreover, even if requirement for khas possession is held to be identical with requirement "for his own occupation" there

must be averment and proof that the landlord contemplated discontinuing letting to thika tenants. Mr. Banerjee's contention is that the phrase, "discontinuing letting to thika tenant" qualifies not only the phrase "otherwise developing the land" but also the other clauses of Sub-clause (IV), i.e., the landlord has to prove that the land is required by the landlord for his own occupation by discontinuing letting it to thika tenants and so on.

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The second branch of Mr. Banerjee's argument is that the suit was in any case liable to dismissal because section 4(b) which requires at least three months' notice was not complied with in the present case.

As regards the first contention of Mr. Banerjee to the effect that by reason of section 5 the Munsif had no jurisdiction to try the suit Mr. Biswas for the substituted respondents contends first the defendant is estopped from contending that the present suit is governed by section 5 or for the matter of that by any provision of the Thika Tenancy Act. His second contention is that even if it be held that the defendant is not estopped neither section 5 of the Thika Tenancy Act nor any other provision of that Act is applicable to a suit like the present one which was instituted before 28-2-49 when the 1949—Act came into operation, but such a suit is to be tried by the ordinary court under the provisions of the ordinary law.

I propose to deal with the first contention of Mr. Biswas regarding the point of estoppel. The point arises in this way. As has been mentioned before the present suit was instituted on 23-3-48, that is, even before the promulgation of the West Bengal Ordinance 1 of 1948 which was followed by the Calcutta Thika Tenancy Act (West Bengal Act II of 1949). The suit was pending at the time when the Calcutta Thika Tenancy Act of 1949 came into existence. Thereupon the plaintiff filed a petition praying for permission to amend the plaint in order to bring it in conformity with the provisions of section 3 of the Calcutta Thika Tenancy Act, 1949. This petition was filed on the 9th of April 1949. This prayer for amendment was, however, vigorously opposed by the defendant who stated *inter alia* in his objection petition dated 27-5-50 that the property

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in suit could not come under the purview of that Thika Tenancy Act, 1949 and as such the amendment sought to be introduced by the plaintiff was not permissible. The question came up for hearing before the learned Munsif who disposed of the matter by his order dated 3-6-50. The relevant portion of the order may be quoted:

> "The learned Advocate for the defence contends that the case does not come within the purview of the Calcutta Thika Tenancy Act, 1949. The learned Advocate for the plaintiff petitioner takes the defendant opposite party at his word and submits that he would not press for the prayer for amendment."
>
> "On a perusal of the pleadings it is apparent that the case does not come under the Calcutta Thika Tenancy Act. It is also the common case of the parties that the suit should be tried under the general law and not under the Calcutta Thika Tenancy Act, 1948. The order of transferring the suit to the file of the Controller is obviously mistaken and should be vacated. Hence by exercise of inherent jurisdiction I correct the mistake and order that the suit be withdrawn from the file of the Controller and restored to the original file and number. The prayer for amendment is rejected as not pressed."

It may be mentioned incidentally that the suit had been transferred by the learned Munsif to the file of the Controller by his order dated 23-12-49 in view of the passing of the Calcutta Thika Tenancy Act. The circumstances set forth above provide the foundation for Mr. Biswas' argument that the defendant is estopped from contending now that he is entitled to the benefit of the Thika Tenancy Act. In my opinion this contention based on the ground of estoppel cannot be upheld and for the following reasons. There is the general principle about no estoppel against statute. Secondly, at the time when the defendant was resisting the plaintiff's prayer for amendment of the plaint the law as regards what exactly was meant by a Thika Tenant was according to the interpretation of he same by this Court, different from what it is now according to the present amendment of the Thika Tenancy Act.

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Moreover, the specific case of the defendant at the time was that he had a lease for 20 years in his favour and as such he was not a thika tenant. Further more, his contention at the time was that the case does not some within the purview of the Calcutta Thika Tenancy Act, 1949, that is, the Thika Tenancy Act as it then stood. He did not commit himself then to the position that he could not be a thika tenant if the law were altered subsequently. Under these circumstances I am of opinion that the doctrine of estoppel cannot operate against the defendant appellant and preclude him from contending now at the time of this appeal that he is entitled in spite of that had happened before to take up the position that he is a thika tenant under the present law and as such entitled to the benefits conferred upon such tenants by that law as it stands now.

This brings me to the second contention of Mr. Biswas that neither section 5 of the Thika Tenancy Act as amended nor any other provision of that Act is applicable to a suit like the present one which was instituted prior to 28-2-49 when the original Thika Tenancy Act, namely Act II of 1949 came into existence, but such a suit is to be tried by the ordinary Civil Court under the provisions of the ordinary law. A plain reading of section 5 would seem to negative Mr. Biswas contention that it is applicable only to suits instituted after 28-2-49. Section 5 as it stands now after amendment does not say in terms that it is to apply only to suits instituted after that date. On the contrary, the section is couched in general terms making it applicable to all cases when a landlord wishes to eject a tenant, but then Mr. Biswass argues—what was than the necessity of a provision like section 29 in the original Act? Mr. Biswas contends further that the very fact that a section like 29 providing for the application of the 1949 Act to a pending suit was enacted shows that it was not the intention of the Legislature that section 5 per se would be applicable to pending suits. Pursuing this line of argument to its logical conclusion Mr. Biswas contends that now that sections 28 and 29 have been omitted from the 1949 Act (vide section 8 of the Calcutta Thika Tenancy (Amendment) Act 1953 section 5 as it stands now can only mean that it is not applicable to a suit like the present one instituted prior to 28-2-49 with the result that the ordinary Civil Court is the proper forum for the trial of such a suit.

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I am unable, however, to assent to this construction of section 5. By reason of the proviso to section 1(2) of the Amending Act, e.g. Act VI of 1953, it is to be held that on 28-2-49 (when the 1949 Act came into force) the Thika Tenancy Act stood without sections 28 and 29 of the 1949 Act. In other words, on that date the law was that a landlord wanting to eject a thika tenant was to apply to the Controller. The question was that was to happen to suits like the present one which had been instituted prior to that date. Under the 1949 Act there was special provision for such suits contained in sections 28 and 29. Those provisions have, however been delted by the Amending Act. Such suits, if pending, cannot be transferred to the Controller under section 29, nor if already decreed before 28-2-49 can the decree be rescinded or varied under section 28. Was it then the intention of the Legislature that in such cases a Thika tenant would be deprived of the various substantial benefits, as for instance, compensation for structures (vide section 4 proviso II) which have been conferred upon him by the 1949 Act? In my opinion such could not be the intention of the Legislature. I am constrained therefore, to hold that a thika tenant of such nature is also entitled to the benefits of the Act even in cases where a suit for ejectment had been instituted against him before the 1949 Act came into existence but which was pending before the Act came into force. Had it not been the intention of the Legislature it would have spoken in clearer accents in the Amending Act. I uphold, therefore, Mr. Banerjee's argument that the learned Munsif had no jurisdiction to try the suit by reason of section 5 (as amended) of the Act. The nett result of section 1(2) proviso and section 8 of the Amending Act in so far as its effect on section 5 is concerned is that the decree passed against the defendant has to be vacated as being passed by a court without jurisdiction. The decree passed by the lower Court must, therefore, be vacated and the learned Munsif will have to return the plaint for refiling it before the Controller. This would appear to be an unfortunate result involving waste of labour, time and money, but this, it seems to me, is the logical result of an ill drafted piece of legislation.

It remains for me now to dispose of another argument of Mr. Biswas. The appeal in the lower Appellate Court was decided on 21-4-52 and the present appeal was filed in this

Court on 16-5-52 Mr. Biswas has contended that thought it was open to the defendant to take advantage of the provisions of section 5(2) of the Calcutta Thika Tenancy (Amendment) Ordinance of 1952 which gave him time to apply before the Court within three months of the Commencement of that ordinance—that Ordinance, it may be noted, came into operation with effect from 21-10-52—the defendant did not avail himself of that provision and is, therefore, precluded from claiming benefit in the present Act. I am inclined, however, to agree with Mr. Banerjee that simply because the defendant appellant did not choose to avail himself of that remedy by way of section 5(2) of the Calcutta Thika Tenancy (Amendment) Ordinance 1952 he is not shut out from claiming the benefit of the subsequent Calcutta Thika Tenancy Amendment Act, 1953. I do not find any provision anywhere which deprives the defendant of claiming the benefit of the present Amending Act. This contention of Mr. Biswas, therefore, must accordingly be negatived.

As regards the other points canvassed before me by Mr. Banerjee it is not necessary for me to express any opinion at this stage and as such I refrain from doing so.

I may mention that another point which has been urged before me by Mr. Banerjee is that as the substituted respondents acquired the interests of the plaintiffs during the pendency of this appeal in this Court they are not entitled to claim mesne profits for the period prior to their purchase unless and until they prove that they have such a right according to the terms of their conveyance. It is not necessary for me to express any opinion on this point either apart from mentioning this contention.

The result, therefore, is that the appeal is allowed, the judgments and decree of the lower courts are set aside and the plaint is directed to be returned for refiling it before the Controller.

In the circumstances, there will be no order as to costs in this appeal.

Leave to appeal under clause 15 of the Letters Patent is prayed for and is granted.

S.G.P. *Appeal allowed.*

Leave granted for Letters Patent Appeal.

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee and
Mr. Justice S. K. Sen.

SUKUMAR SEN
v.
AMRITA LAL MUKHERJEE.*

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1953.

September, 8.

West Bengal Premises Rent Control Act 1950—Section 18(5)—Relief against ejectment under Rent Act of 1948—Ipso facto *determination of tenancy under 1948 Act—Tenant ordered to deposit rent under section 18(5) of the 1950 Act—Tenant's failure to make deposit—Whether the tenant is entitled to pray for relief against ejectment for the second time*

Where the tenancy was *ipso facto* determined under Section 12(3) of the Rent Act, 1948, and the tenant, on the coming into force of the 1950 Act, prayed for relief against ejectment, under Section 18(5) of the later Act, and was ordered by the Court to deposit the arrears of rent but failed to do so, and where the tenant prayed for the second time for relief against ejectment under Section 18(5) of the Rent Act of 1950:

Held. If the tenant has been afforded full opportunity to avoid ejectment by making the necessary deposit but has failed to avail himself of the same, he is not entitled to apply again for the said relief. The statute contemplates the affording of one opportunity under Section 18(5) and, if that is allowed to pass, the defaulting tenant is not entitled to a second indulgence.

Appeal by the tenant Defendant.

Suit for ejectment by the Landlord.

The material facts will appear from the judgment.

Nripendra Nath Sen for the Appellant.

Ajit Kumar Dutta, Ashutosh Ganguly, Nirmal Ch. Chakravarty and Bhuban Mohan Saha for the Respondent.

* Appeal from Appellate Decree No. 537 of 1951, against the decree of Pramathia Nath Lahiri, Subordinate Judge, First Court of Zillah 24-Parganas, in Title appeal No. 678 of 1950 dated the 5th February 1951, affirming the decree of Gouranga Bhusan Ghose, Munsif 1st Additional Court, Alipore, dated the 23rd of May 1950.

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Sukumar Sen v. Amrita Lal Mukherjee.

P. N. Mukherjee, J.

The judgment of the Court was as follows:—

P. N. Mookerjee, J.:—In this appeal by the tenant defendant some aspects of the statutory provisions contained *inter alia* in section 12(3) of the Rent Control Act of 1948 and sections 14(5) and 18(5) of the Rent Control Act of 1950 fall to be considered.

The material facts are now beyond dispute and they are as follows:—

The appellant was a monthly tenant under the respondent landlord in respect of a portion of premises No. 3B, Nakuleswar Bhattacharjee Lane, at a rent of Rs. 30/- per month. The tenancy was according to the English Calendar and the appellant failed to pay or deposit in accordance with the provisions of the prevailing Rent Control legislation the rent at least from April 1949 whereupon, on three months' consecutive default, namely, from April to June 1949, his tenancy became *ipso facto* determined under the Rent Control Act of 1948 and the respondent brought the present suit for ejectment, arrears of rent and mesne profits on the 1st August 1949. Various defences, raised to the suit, were negatived by the learned Munsif who eventually decreed the suit on the 23rd May 1950. In the meantime, the rent Control Act of 1950 had come into operation on the 31st March 1950 and, as the suit was admittedly pending on that date, the learned Munsif, on the defendant's application, gave him permission (vide order No. 11, dated 31-3-50) to make the necessary deposit under section 18(5) of the Act to avail himself of the benefit of the said statute and obtain relief against ejectment. The deposit however, was not made and, in the result, the decree was passed as aforesaid.

There can be no doubt that the decree was rightly made by the learned Munsif. The suit was filed on the 1st August 1949 when the Rent Control Act of 1948 was in force. The case would, therefore, be governed by that Act except so far as the passing of the Act of 1950 during its pendency affected it in law. It cannot be disputed that, at the date of the suit, the appellant had made the requisite default in the payment of rents of three consecutive months, namely, April, May and June

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1949, and his tenancy had thus *ipso facto* determined under section 12(3) of the said Act of 1948. It is true that the respondent served no proper or sufficient notice to quit upon the appellant but, in a case of *ipso facto* determination of tenancy under the statute of 1948, no such notice is plainly necessary. The tenancy terminates by reason of the statutory provision alone and, once the requisite default in the payment of three consecutive months' rent in respect of the rented premises is committed, the interest of the tenant in such premises is "*ipso facto* determined" and he is to be no longer "deemed to be a tenant." This is expressly provided in the statute itself and no clearer words would be necessary to indicate the immediate determination of the tenancy. As soon, therefore as the default was made the appellant became a trespasser and no notice whatsoever was at all necessary in the matter. There was nothing, except possibly section 18(5) in the Rent Control Act of 1950, which had come into force on the 31st March 1950 during the pendency of the suit before the learned Munsif, to affect this position or to revive or restore the appellant's tenancy. Even with regard to the said section 18(5) of the original Act of 1950, this Court held in the two Special Bench cases of *Sm. Nandorani Dassi* v. *Satya Narayan Harit* (1) and *S. B. Trading Co. Ltd.* v. *Satyendra Chandra Sen* (2), that the said section had no application to cases of *ipso facto* determination of tenancies under section 12(3) of the 1948 Act. The position, however, was altered by the later legislative amendment of the Rent Control Act, namely, the Amending Act 62 of 1950, where, by the combined operations of sections 2, 4 and 5, the provisions of section 18(5) were made applicable to such cases with full retrospective effect, that is, from the commencement of the original Act of 1950. The position in the present case thus was that the appellant was liable to be ejected subject to the relief, if any, available to him under section 18(5) of the Rent Control Act of 1950. That relief was offered to him by the learned Munsif but he failed to avail himself of the opportunity and the ejectment decree rightly followed.

Before the trial court there was also a defence plea of waiver on the part of the plaintiff-respondent of his right to eject the

(1) (1950) 54 C.W.N. 735.
(2) (1950) 54 C.W.N. 756; 86 C.L.J. 46.

defendant. This was based on the insufficient notice to quit, Ex. 1 which was served on the defendant, claiming rent up to the 15th July 1949, and the argument was that if the tenancy had terminated under section 12(3) of the Rent Control Act of 1948, it must have so terminated on the expiry of June 1949, the relevant three consecutive months of default being April May and June 1949 and that, accordingly, demand of rent for the next fifteen days of July 1949 amounted to a waiver of the statutory forfeiture. This argument was rejected by the learned Munsif and in our opinion, rightly, as in this case there being no contract to the contrary, the rent for June 1949 could have been paid under the relevant statute on or before the 15th of the following month. The final default, requisite under section 12(3) of the 1948, Act, therefore, occurred only on the expiry of the 15th July, 1949, and not before and in law, therefore the tenancy subsisted upto the 15th July 1949. The claim for rent upto this stage was, therefore rightly made by the plaintiff respondent and no question of waiver at all arises and the learned Munsif committed no error in rejecting the defendant's plea in that behalf.

In this appeal before the learned Subordinate Judge the defendant appellant reiterated his pleas, based on the questions of notice and waiver but the same were rejected. For reasons, already given, that decision also must be held to be correct.

The defendant-appellant also applied again before the learned Subordinate Judge for relief under section 18(5) of the Rent Control Act of 1950. This application was made under the new amended section 18(5) the Amending Act 62 of 1950 having come into force in the meantime. The learned Judge, however, held that in view of what had already happened before the learned Munsif, namely, that the appellant had been afforded full opportunity to avoid ejectment by making the necessary deposit but had failed to avail himself of the same, he was not entitled to apply again for the said relief. In our opinion, the learned Subordinate Judge took the correct view of the law in the circumstances of this case. The amended statutory provision was given, as we have already said, full retrospective effect, that is, from the commencement of the original Act of 1950, when the suit was pending before the

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learned Munsif. The latter's order, therefore, allowing the defendant to make the necessary deposit to avoid ejectment was validly passed but this opportunity, properly granted, was not availed of by the defendant. The statute, so it seems to us, contemplates the affording of one opportunity under section 18(5) and, if that is allowed to pass, the defaulting tenant is not entitled to a second indulgence. The defendant-appellant's application under section 18(5) of the Rent Control Act was, therefore rightly rejected by the learned Subordinate Judge.

The objections, which we have discussed above, to the plaintiff's claim for ejectment comprise all the points which were urged before us by the learned Advocate for the appellant. We have held above that there is no substance in any of the said objections and we have already given our reasons for that view. This appeal must, therefore fail.

Before concluding, we ought to mention that, in this case, there was an order by this Court under section 14(5) of the Rent Control Act, 1950 directing the appellant to make certain deposits at certain times and providing further that, in case of any default on his part, his defence to the plaintiffs claim for ejectment would "be struck out" and he would "be placed in the same position as if he had not defended the claim to" ejectment in the trial Court." On the strength of this order the respondent raised a preliminary objection at the hearing of this appeal and he had also filed previously an application for the purpose on 4-4-52 that as admittedly the appellant had committed defaults in the carrying out of that order, no hearing of the appeal was either necessary or possible and it had only to be dismissed. The appellant did not deny the defaults but it was contended by his learned Advocate that the effect of the order was only this that he would have to argue the appeal on the footing that the trial court's decree was ex-parte and he would not be entitled to refer to or rely upon either his client's written statement or the evidence adduced by him. He, however, urged that inspite of his client's inability or failure to carry out the order of this Court, passed under section 14(5) of the Rent Control Act of 1950, he was not absolutely debarred from pressing his appeal or urging the dismissal of the plaintiffs

suit on pure points of law, arising on admitted facts or on the plaintiff's own case or materials, and the learned Advocate relied upon the decision of Sarkar J. in the Case of *S. B. Trading Co. Ltd.* v. *Olympia Trading Corporation Ltd.* (1), in support of the position taken up by him. It appeared to us that the terms of the order of this Court under section 14(5) were not very clear so as to point necessarily to a dismissal of the appeal, as urged by Mr. Datta for the respondent. We accordingly decided to hear the appellant's Advocate as *Amicus Curia* to avoid prejudice or injustice without disturbing the order of this Court and we have heard him fully on all his possible contentions. We are however, as stated above, unable to accept any of the said contentions for reasons, already given.

In the result, therefore, this appeal must fail and it is dismissed with costs.

What we have said above also disposes of the Respondent's connected application filed on 4-4-52, to which reference has been made by us in the course of this judgment and which was ordered by this Court to come up for hearing along with this appeal, (vide order dated 23-4-52) and no further order is necessary on that application.

S. K. Sen, J.:—I agree.

S.G.P. *Appeal dismissed with costs.*

(1) (1951) 88 C.L.J. 298.

ORIGINAL CIVIL.

Before Mr. Justice S. R. Das Gupta.

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September, 3.

MESSRS. SHAH & COMPANY

v.

MESSRS. ISHAR SINGH KIRPAL SINGH & CO.[1]

Arbitration—Section 30 and 33 of the Indian Arbitration Act, scope of—Challenge to the validity of contract or arbitrators' jurisdiction, whether can be a ground of an application under section 30 of the Arbitration Act.

Limitation—Article 181 of the Limitation Act—An application under section 33 of the Arbitration Act, whether ruled by Article 181 of Limitation Act—First Schedule to the Limitation Act, whether it now relates exclusively to applications under the Civil Procedure Code.

Where the petitioner's case is that the arbitrators had no jurisdiction to proceed with the reference or to make an award and the award, therefore, is a nullity, an application should be made under section 33 of the Arbitration Act for the determination of the question as to the existence, effect or validity of an arbitration agreement and/or of the award made by the Arbitrators.

The power conferred on the Court to set aside an award under the Act presupposes the existence of valid reference and if there is no valid reference or no refernce at all then the award is a nullity and a declaration to that effect can be obtained under section 33 of the Act. But an application under section 33 is not maintainable on the ground that there was no valid reference or no reference at all and consequently the arbitrators had no jurisdiction to make the award. The proper application to make in such a case would be an application under section 33 of the Indian Arbitration Act which is a specific provision made for that purpose in the Act itself. The question as to whether or not the arbitrators who made the award had any authority to proceed with the arbitration cannot be gone into in an application under section 30 of the Arbitration Act and the award cannot be set aside on that ground.

Grounds on which a petitioner may seek to make an application under section 33 cannot be available to him in an application under section 30.

As a result of the enactment of the Arbitration Act of 1940, two Articles have been introduced in the Limitation Act, namely, Articles 158 and 178 which relates to applications under the Arbitration Act. Thus it appears that the First Schedule to the Limitation Act no longer relates to applications under the Civil Procedure Code, other matters have been incorpo-

[1] Award Case No. 244 of 1948.

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ated in the said Schedule. It cannot now be said that by applying the doctrine of *Ejusdem generis* the residuary article must be held to apply only to applications under the Code of Civil Procedure. The same procedure as is laid down in the Civil Procedure Code is attracted to applications under Indian Arbitration Act, and section 37 of the Act lays down that all the provisions of the Indian Limitation Act shall apply to arbitration as they apply to proceedings in Court. An application under section 33 of the Indian Arbitration Act, therefore, must be held to be governed by the residuary Article 181 of the Limitation Act.

Asmatali v. *Mujaharali Sardar & ors.* (1), followed.

An application to set aside an Award.

The material facts will appear from the judgment.

G. P. Kar for the Applicant.

S. N. Modak for the Respondents.

The judgment of the Court was as follows:—

S. R. Das Gupta, J.:—This is an application for an order:

(a) That the existence, effect and/or validity of the said alleged arbitration agreement and all questions relating thereto be decided and determined by this Court.

(b) That it be declared that there was no valid, binding or effective or subsisting arbitration agreement between the parties or that the disputes and differences, if any, are referrable to such arbitration.

(c) That the said purported award dated 7th February 1949 be set aside.

(d) Costs and incidental expenses be paid to the applicant.

The facts necessary for me to determine the merits of this application, shortly stated, are as follows:—

(1) [1948] A.I.R. Cal. 48.

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On April 26, 1948, there was a contract between the parties. The sowda in respect of the said contract has been set out in Annexture 'A' to the petition. The said sowda contains amongst others the following term:—

> "All sowdas subject to rules and regulations of the Calcutta Kirana Association whose decision is final and binding on both the buyers and the sellers."

On September 25, 1948, the Calcutta Kirana Association went into voluntary liquidation by a special resolution passed on that date and one S. K. Chakravarty was appointed liquidator. Thereafter on October 29, 1949 (species) Merchants' Association was incorporated and all the rules of the Calcutta Kirana Association were incorporated in the new Association and were filed with the Registrar. The special resolution which was passed on September 25, 1948, *inter alia* provides as follows:

> "Resolved that the Calcutta Kirana Association be voluntarily wound up and the members of the Managing Committee be authorised to take all necessary steps to wound up the affairs of the Association."

> "Resolved that the Association consents to formation of an Association in the name of the Calcutta Kirana Merchants' Association by some of the members of the Association of such other name similar or identical to the existing name of the Association."

Disputes and differences arose between the parties with regard to the said sowda. The respondent referred such disputes to the Calcutta Kirana Merchants' Association. The petitioner received a letter from the Secretary of the said Kirana Merchants' Association dated 15th October, 1948 asking the petitioner to attend the executive committee meeting of the said Association in respect of the said references made by the respondent to the said Association. The petitioner protested and refused to appear because the petitioner's case was that he never agreed to refer the disputes to the Calcutta Kirana Merchants' Association; the case of the petitioner being that the agreement to refer was to Calcutta Kirana Association as is

embodied in the sowda itself. After a number of letters written to the petitioner asking the petitioner to attend the meeting of the said Association the said Calcutta Kirana Merchants' Association on the 7th Feb. 1949 made an award in favour of the respondent. It is with respect to that award that the petitioner has made the present application.

The ground taken by the learned counsel appearing for the petitioner in support of this application is that the arbitrators who purported to arbitrate over the said disputes and made the said award had no jurisdiction to do so, because, as would appear from what I have already state, the case of the petitioner before me is that the body to which the party agreed to refer their disputes was not this Calcutta Kirana Merchants' Association but the Calcutta Kirana Association, and the parties never agreed to abide by their arbitration and this Calcutta Kirana Merchants' Association had no right or authority to make the award. This is the substance of the contention of the learned counsel appearing on behalf of the petitioner and this is the only ground which has been urged before me in respect of this application.

Mr. Kar appearing on behalf of the petitioner contended before me that in the circumstances of the case I should hold that the award is bad on the face of it, because, the award is not the award of the arbitrators to whom the parties agreed to refer under the said arbitration agreement. In the circumstances as aforesaid he contended that I should set aside the award.

As would appear from the prayers in the petition to which I have already referred that the petition as framed consisted of two parts. In other words, there are really two applications contained in one, being an application under section 33 of the Indian Arbitration Act and an application under section 30, of the said Act. The first two prayers, namely, that the existence, effect and/or validity of the said alleged arbitration agreement and all questions relating thereto be decided and determined by this Court and that it be declared that there was no valid, binding or effective or subsisting arbitration agreement between the parties or that the disputes and differences if any, are referable to such arbitration, are certainly prayers relating to an application under section 33 of the Indian Arbitration

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Act. The other prayer in the petition, namely, that the said purported award dated 7th February 1949 be set aside, is a prayer relating to an application under section 30 of the Indian Arbitration Act.

The learned counsel for the respondent took a preliminary objection to the application, so far as it is an application under section 33 of the Indian Arbitration Act. He contended that the application, as an application under section 33 of the Act, is barred by limitation. According to him Article 181 of the Indian Limitation Act should apply to an application under section 33 of the Indian Arbitration Act. Article 181 reads as follows:—

Art. 181. Application for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908.	Three years.	When the right to apply accrues.

The learned counsel contended before me that the application under section 33 of the Indian Arbitration Act is governed by this Article. He drew my attention to sections 37 and 41 of the Indian Arbitration Act. Section 37 provides that "all the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in court." Section 41 of the said Act *inter alia* provides that "Subject to the provisions of this Act and all the rules made thereunder the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court and to all appeals under this Act."

On the strength of these sections the learned counsel contended that the provisions of the Code of Civil Procedure have been made applicable to all proceedings before this Court which may be taken under this Act and he further contended that under section 37 of the Indian Arbitration Act the provisions of the Limitation Act have been made expressly applicable to an arbitration in the same manner as they apply to proceedings in court. Therefore the learned counsel contended the provisions of Article 181 of the Indian Limitation Act should be applied.

The scope and effect of Article 181 of the Indian Limitation Act has come up for consideration in a large number of cases both in this court as well as in other courts. It has no doubt been held in a long series of decisions that this Article is confined only to applications made under the Civil Procedure Code.

The main reason for these decisions was that on examination of the articles in the first schedule of the Limitation Act it appeared that in not one of them the application is made under the Code of Civil Procedure and applying the doctrine of *ejusdem generis* the application which is contemplated in Art. 181 of the Limitation Act must be confined to the same type of applications which are contemplated in the other articles in the said schedule, that is to say, applications under the Civil Procedure Code. This undoubtedly was the position before some of the provisions of the said schedule came to be altered as a result of the enactment of the Indian Arbitration Act of 1940. For instance Article 158 of the Limitation Act which is an article in the said schedule had to be amended in the manner as follows:

Description of application.	Period of limitation.	Time for which period begins to run.
Art. 158. Under the Indian Arbitration Act 1940 to set aside an award or to get an award remitted for reconsideration.	Thirty days.	The date of service of the notice of filing of the award.

Thus it appears that originally the application which was contemplated under the said Article was an application to set aside the award under the Code of Civil Procedure but in the amended article an application under the Arbitration Act to set aside an award has been incorporated. Some other amendments have also been made in the said schedule. As for instance, in Article 178 in place of the words "same Code" the words substituted are "under the Arbitration Act, 1940." Thus it appears that the first schedule to the Limitation Act no longer relates exclusively to applications under the Civil Procedure Code; other matters have been incorporated in the said schedule. If that is the position, then the reason which was the basis of all the previous decisions are no longer applicable. It cannot

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now be said that applying the doctrine of *Ejusdem generis* the residuary article must be held to apply only to applications under the Code of Civil Procedure. This question came up for consideration before the Court of Appeal in the case of *Hurdatrai Jagadish Prosad* v. *Official Assignee of Calcutta* (1), and Mukherjea J. in his judgment delivered in that case observed as follows:—

"As regards Art. 181 of the Indian Limitation Act, it has been held in a long series of decisions that the residuary Article is confiled to applications made under the Civil Procedure Code." (His lordship then referred to cases which have been so decided). "The main reason underlying these decisions is that the examination of all the Articles in the First Schedule to the Limitation Act shows that, in every one of them, the application is made under the Civil Procedure Code. A residuary article it is said should be construed *ejusdem generis* with the other articles deeling with applications. The other ground put forward is that the preamble to the Limitation Act indicates that it is intended to apply not to all applications but only to certain applications. It is to be pointed out that by the Arbitration Act of 1940, two Articles have been introduced in the Limitation Act, namely, Articles 158 and 178 which relate to applications under the Arbitration Act; and it may be, as was observed in the Special Bench decision of *Asmatali Sharip* v. *Mujaharali Sardar* (2), necessary to examine at some time or other closely the reasons upon which the decisions mentioned above purport to be based. But, on the present state of authorities. we are bound to say that Article 181 of the Limitation Act is confined to applications "under the Civil Procedure Code or those applications for the making of which the Civil Procedure Code gives authority." Mukharjea J., has no doubt held in his judgment that on the present state of authorities their lordships were bound to say that Article 181 of the Limitation Act is confined to applications under the Civil Procedure Code or those applications for the making of which Civil Procedure Code gives authority but His Lordship has not in fact determined the effect of the incorporation of the Indian Arbitration Act in the said schedule, and has left that question open to be determined at some other time. In fact this question,

(1) [1919] I.L.R. 1 Cal. 19. (2) [1948] A.I.R. Cal 48.

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namely, as to whether or not an application under the Indian Arbitration Act would be governed by Article 181 of the Indian Limitation Act did not arise for his Lordship's consideration in that case which was before him and was not decided by His Lordship. In my opinion, in view of the incorporation into the said schedule matters other than applications under the Code of Civil Procedure the reason which was the basis for the said decisions can no longer be applicable to the question as to whether or not an application under section 33 of the Indian Arbitration Act is governed by Article 181 of the Indian Limitation Act. On the other hand the fact that some of the Articles in the said Schedule relate to some applications under the Indian Arbitration Act show that the residuary Article must apply to all other applications under the Indian Arbitration Act. Even on the principle laid down by Mukherjea J., in his judgment to which I have referred, I should hold that all applications under section 33 are governed by Article 181 of the Code of Civil Procedure. Mukherjea J., has observed that Article 181 of the Limitation Act should be held to be confined to applications under the Civil Procedure Code or those applications for the making of which the Civil Procedure Code gives authority. The question is whether or not an application under section 33 comes within that principle. Again I would refer to another judgment of Mukherjea J., delivered in the case of *Asmatali* v. *Mujahar'ali Sardar & ors.* (1). This was a Full Bench decision and the judgment was delivered by Mukherjea J. In the case a question arose as to whether or not an application under section 26(f) of the Bengal Tenancy Act could be regarded as an application under the Civil Procedure Code or at any rate an application for the making of which the Civil Procedure Code gives authority. Section 26(f) deals with the right of a co-sharer landlord to apply to have the holding or portion of the holding of his co-sharer transferred to himself, and their lordships held that such an application which at any rate was subjected to and regulated by the rules of the Civil Procedure Code was an application to which the provisions of Article 181 of the Limitation Act applied. In his judgment Mukherjea, J., gave the following reasons for the aforesaid conclusion:—

"In our opinion, an application contemplated by section 26(f), Bengal Tenancy Act, can be regarded as an

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application under the Civil Procedure Code, or at any rate an application for the making of which the Civil Procedure gives authority. Under section 143, Bengal Tenancy Act, subject to any rules to the contrary that the High Court may frame with the approval of the Provincial Government, the Code of Civil Procedure is applicable to all suits under the Act. The same Procedure is attracted to applications and other miscellaneous proceedings by virtue of the provisions of section 141, Civil Procedure Code. Section 144(3) Bengal Tenancy Act., further lays down that all applications by landlord or tenant which are authorised to be made under the Act shall be made to the Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the application is made. The entire proceeding in an application under section 26(f) is thus regulated by the Civil Procedure Code and we have no hesitation in holding that the residuary Article 181, Limitation Act would be applicable to such applications, except so far as any special provision has been made in regard to them in the section itself."

In my opinion the reasons given in his Lordship's judgment as aforesaid are equally applicable to the case of an application under section 33 of the Indian Arbitration Act. It can also be said that the same procedure as is laid down in Civil Procedure Code is attracted to applications under the Indian Arbitration Act and in fact section 41 of the Limitation Act has provided that the "Provisions of the Code of Civil Procedure shall apply to all proceedings before the Court and to all appeals under the Act." Thus, as in the case of an application under section 26(f) of B. T. Act, the entire proceedings in an application under section 33 is regulated by the Civil Procedure Code. In the case of section 26(f) the right to make an application under that section is not derived from the Civil P. C. but from the Bengal Tenancy Act itself. Nonetheless their Lordships of the Full Bench held that Article 181 would apply for the reasons mentioned as aforesaid. The position with regard to an application under section 33 is also the same. An application under section 33 is authorised by the Arbitration Act itself but the provisions of the Civil Procedure Code has been made applicable to all applications under the said Act. Again an application under

section 33 has also to be made to the "Court" and "Court" has been defined in the Act itself as follows:—"'Court' means a civil court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject matter of a suit." In the other words all applications under the said Act have to be made to a Civil Court which would have jurisdiction to determine the subject matter of the reference. The matter does not rest here. There is a specific provision in the Arbitration Act itself; that is, section 37 of the Act wherein it has been clearly laid down that all the provisions of the Indian Limitation Act shall apply to arbitration as they apply to proceedings in court. I am constrained to hold following the reasonings of Mukherjea J., given in the said case of *Ashmatali* v. *Mujaharali Sardar & ors.* (1), that an application under section 33 of the Indian Limitation Act is governed by the residuary Article 181 of the Limitation Act. The same view has been taken in a recent decision of the Punjab High Court in the case of *Union of India* v. *Firm Kiroo* (2). I am of the opinion that an application under section 33 of the Arbitration Act is governed by Article 181 of the Limitation Act.

The next question which arises for my consideration is whether or not the application is barred by limitation even if Article 181 applies. In order to determine this question I shall have to go back once again to the first two prayers of the petition. As been pointed out by the learned counsel for the respondent, the said prayers relate to the arbitration agreement and not to the award. In other words, a declaration, as to the existence, effect or validity, has been claimed not with regard to the award but with regard to the arbitration agreement and the prayer is that it be declared that there was no valid, binding or effective or subsisting arbitration agreement. In the premises, the learned counsel contended, the starting point of limitation would be the time when the respondent first sought to enforce the arbitration agreement i.e., when the respondent for the first time referred the disputes to the arbitration. It is then that the cause of action to have the arbitration agreement declared null and void arose. I agree with that contention and if I had to finally adjudicate on this matter I would have held that the application so far as it relates to prayers 1 and 2 thereof is barred by limitation. But Mr. Kar at the close of his argument

(1) [1948] A.I.R. Cal. 48. (2) [1930] A.I.R. Punjab 423.

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submitted before me that his client does not want to proceed with the application as an application under section 33 of the Arbitration Act. What was reason which prompted Mr. Kar to take that course of action I cannot say. I, however, see no objection to allow him to withdraw the said application and to confine his application only to an application under section 30 of the Act. But I make it clear that I do not give him leave to file a fresh application under section 33 of the Act, which may require determination of the question involved in this application.

I now come to the second part of the petitioner's case, namely, that the award should be set aside. As I indicated before, the same grounds which have been urged in the petition so far as it is an application under section 33 have also been taken in support of the prayer under section 30. The said grounds are that the arbitrators who made the award had no jurisdiction to do so, because, they were not the persons to whom the parties agreed to refer. Mr. Kar contended, that the award in these circumstances should be set aside as being bad on the face of it. In my opinion, the said grounds relate to an application under section 33 of the Indian Arbitration Act. They cannot form the grounds for an application under section 30 of the said Act. In the case of *Chhabba Lal* v. *Kalu Lal & ors.* (1), the question arose as to whether or not an objection to the validity of a reference to arbitration does not come within the provisions of section 15 of the 2nd Schedule to the Code of Civil Procedure. It should be remembered, that section 15 corresponds to section 30 of the Indian Arbitration Act. Relying on the words "being otherwise invalid" used in section 15, which words also find place in the present section 30 of the Indian Arbitration Act, majority of the Judges of this Court held that the award can be set aside. Their Lordships of the Judicial Committee disagreed with that view and in their Lordships' opinion all powers conferred on the Court in relation to an award on a reference made in a suit presupposes a valid reference and if there is no valid reference the purported award is a nullity and can be challenged in an appropriate proceeding. It is no doubt true that their Lordships of the Judicial Committee were concerned in their said decision with the 2nd Schedule of the Code of Civil Procedure but, in my opinion,

(1) (1916) 73 I.A. 52.

the position under the Indian Arbitration Act should also be the same. In my opinion the power conferred on Court to set aside an award under the Act also presupposes the existence of valid reference and if there is no valid reference, or no reference at all then the award is a nullity and a declaration to that effect can be obtained under section 33 of the Act. I hold that an application under section 30 is not maintainable on the ground that there was no valid reference or no reference at all and consequently the arbitrators had no jurisdiction to make the award. The proper application to make in such a case would be an application under section 33 of the Indian Arbitration Act which is a specific provision made for that purpose in the Act itself. In my opinion, the question as to whether or not the arbitrators who made the award had any authority to proceed with the arbitration cannot be gone into in an application under section 30 and the award cannot be set aside on that ground. Mr. Kar contended that the words "being otherwise invalid" used in section 30 indicate that such a question can begone into in an application under the said section and the award can be set aside on that ground. I am unable to accept that contention. As I have just now pointed out, their Lordships of the Judicial Committee also did not accept the view that the same words used in section 15 authorised the Court to set aside an award. Mr. Kar then contended that it would be a case of an award being 'improperly procured.' I am also unable to accept that view. This is a case where the arbitrators, according to the petitioner, had no jurisdiction to proceed with the reference or to make the award. The award, therefore, is a nullity and in such a case an application should be made under section 33 for determination of the question as to the existence, effect or validity of an arbitration agreement and/or of the award made by the arbitrators. Before concluding this matter I should refer to the case reported in *Rajlakshmi Dassee* v. *Katyani Dassee* (1), relied on by Mr. Kar in his argument. I do not see how that case is of any assistance to Mr. Kar. What was decided in that case was that if a Court has no jurisdiction over the subject-matter of the litigation, its judgments and orders, however, previsely certain and technically correct, are mere nullities and are void and have no effect either as estoppel or otherwise and may not only be set aside at any time

(1) (1910) I L.R 38 Cal. 639.

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S. R. Das Gupta, J.

by the Court in which they are referred to be declared void but by every Court in which they may be presented. There can be no question as to the soundness of the observations made in that case, and I cannot dispute the proposition of law which has been laid down by their Lordships in that case, but the position here is different. The question here is what would be the section of the Indian Arbitration Act under which a party who wants to challenge the existence or effect of an arbitration agreement should apply. I do not see how that decision is of any assistance to Mr. Kar in establishing his point of view with regard to this matter. The only other case cited by Mr. Kar in support of his contention is the case reported in *Chetandas Daga & ors.* v. *Radha Kisson Ram Chandra & ors.*" (1). That case also, in my opinion, is of no assistance to him and by no means supports his contention which is raised before me What their Lordships held in that case was that in view of the fact that the actual award itself was not before their Lordships and there was no evidence as to whether or not the arbitrators gave notice of the amount of their fees an charges and in view of the fact that their Lordships did not know as to whether or not the award has in fact been filed, there was no award within the meaning of section 14 of the Act before their Lordships. Consequently, their Lordships held that if there was no award then there was nothing which can be set aside and their Lordships, in the circumstances, thought it unnecessary to decide whether the award mentioned in section 14 extends to an unfiled award or whether it is confined to a filed award. I cannot make out how Mr. Kar can contend that this case is of any assistance to him I do not see how this case is at all relevant to the question which I have to determine on this application.

The result, therefore, is that, in my opinion, the grounds on which the petitioner seeks to make this application under section 30 are all grounds relating to an application under section 33 and cannot be available in an application under section 30. But the application under section 33 has been withdrawn by Mr. Kar. The result, therefore, is that the application under section 30 is dismissed, with costs.

Mitra & Ganguly: Solicitors for the Petitioner.

P. C. Bose: Solicitor for the Respondent.

S.C.P. *Application dismissed with costs.*

(1) [1927] A.I.R. Bom. 553.

APPELLATE CIVIL.

Before Mr. Justice Rama Prasad Mookerjee and Mr. Justice Renu Pada Mukherjee.

BENOY BHUSAN MUKHERJEE & ORS.

v.

BINA MUKHERJEE & ANR.*

CIVIL.

1953.

September, 4.

Minors—Lottery tickets purchased in the name of a minor child—Claim by the father for the prize—Whether the minor child or the father is the owner of the ticket and prize.

Where lottery ticket was purchased by the father in the name of one of his minor child, and the father claimed the prize money claiming the ownership of the ticket:

Held: In the face of evidence that the father purchased the ticket with his own money and for his own benefit and in the absence of any evidence to show that he intended to purchase it exclusively for the benefit of the minor child, the father is the real owner of the ticket and is entitled to the prize money even if he has used the name of the child to try his luck.

Appeal by the Plaintiffs:

Suit for declaration of ownership of a Lottery Ticket.

The material facts will appear from the judgment.

Hari Prasanna Mukherjee and Jnanendra Nath Bakshi for the Appellants.

Saroj Kumar Bagchi for the minor Respondent No. 1.

Suraths Mohan Sanyal for the Respondent No. 2, (cross-objector).

The judgment of the Court was as follows:—

* Appeal from Original Decree No. 217 of 1952 (Cross-objection), against the decree of Sri N. M. Sarkar, Sub-Judge 5th Court of Zillah 24-Parganas in Title Suit No. 145 of 1949 dated 18th of April 1952.

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1953.

Benoy Bhusan Mukherjee
v.
Bina Mukherjee

Renupada Mukherjee, J.
September, 4.

Renupada Mukherjee, J.:—In this appeal we are concerned with the ownership of a lottery ticket purchased by one Ramani Mohan Mukherjee in the name of his minor daughter Bina Mukherjee. The ticket was issued by the Calcutta Rangers Club and it won one of the 7 first prizes in the Derby Sweep held in England on the 4th of June 1949. The amount of the prize was Rs. 47,176. After the results of the sweep were published Ramani claimed the money from the Rangers Club which advised Ramani to produce a certificate of guardianship regarding Bina Mukherjee because she, the registered holder of the ticket, was a minor. Some correspondence passed between the parties over this matter. Ramani failed to produce the certificate in question and the club refused payment. Thereupon Ramani brought this suit for declaration of his exclusive right to the lottery ticket as also to the prize money described respectively in Schedules A and B if the plaint.

The principal defendant in the suit was Bina Mukherjee who was at first represented by his brother Benoy Bhusan Mukherjee. The Calcutta Rangers Club was made a proforma defendant. The members of the executive committee of the Club were also later on made Proforma Defendants on the objection of the Rangers Club.

The suit was separately contested on behalf of minor Bina Mukherjee who was ultimately represented by a pleader guardian and by the Rangers Club. The defence of the Club is no longer material because in the appeal before us it was stated on behalf of the Club that it would pay the money to the person or persons declared by the Court to be entitled to the money.

The defence on behalf of Bina Mukherjee was that she was the rightful owner of the ticket and that the suit was not maintainable inasmuch as the contract which was the foundation of the suit was a wagering contract.

Ramani Mohan died during the pendency of the suit. Two major sons, two minor sons, and a widow were substituted in his place and they carried on the suit in the lower court. The suit was dismissed by the trial court and so the heirs of Ramani Mohan Mukherjee have preferred this appeal.

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Benoy Bhusan Mukherjee v. Bina Mukherjee

Renupada Mukherjee, J.

In the appeal before us the only point which arises for decision is who was the owner of the ticket which won one of the first prizes in the Derby Sweep. The objection that the suit is not maintainable in view of Section 30 of the Indian Contract Act was abandoned in this Court, both on behalf of the minor defendant as well as on behalf of the Club.

Regarding the question of ownership of the disputed ticket it is difficult to see how the trial court could arrive at the finding that Bina and not her father Ramani Mohan Mukherjee was the rightful owner of the ticket. Admittedly, Bina was a child of 3½ years when the ticket was purchased. It is not also the case on behalf of the minor that this ticket was purchased by somebody else other than the father on behalf of Bina. Ramani Mohan died during the pendency of the suit and his son Benoy Bhusan Mukherjee deposed and proved that his father had purchased the ticket with his own money and for his own benefit. There is no reason to disbelieve this statement. Ramani Mohan was a poor clerk in the employment of the Railway drawing a pay of Rs. 70/- per mensem. Besides the daughter Bina who was his youngest child he had also four sons, two of whom were minors, and a wife. There is absolutely no reason to think that he intended to purchase the ticket exclusively for the benefit of the minor daughter. From the evidence of Benoy and also the circumstances of this case it is abundantly clear that the ticket was purchased for his own benefit. The name of the daughter was used simply because he wanted to try his luck by using the name of the daughter who was the youngest child.

On behalf of respondent Bina Mukherjee reliance was placed upon a letter dated the 14th June, 1949, written by Ramani Mohan Mukherjee to the Rangers Club (Ex. B1). In this letter Ramani Mohan stated that the ticket was inadvertently purchased on behalf of his daughter Bina Mukherjee who is a minor. Too much reliance should not be placed upon this letter for the purpose of determining who was the real owner or beneficiary of the ticket. In the next letter which was written by Ramani Mohan Mukherjee to the Rangers Club on the 8th July, 1949 (Ex. B3) Ramani Mohan made it clear beyond doubt that Bina Mukherjee was a minor barely 3½ years old and the

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Renupada Mukherjee, J.

ticket was purchased with Ramani's money in the name of Bina "out of fancy." In this state of the record I hold that Ramani Mohan Mukherjee was the real owner of the ticket and he was entitled to get the prize money in question. He would certainly have got the declaration prayed for in his favour if he had been alive. But the same declaration cannot be made in favour of the plaintiffs alone, although they are the legal heirs of Ramani Mohan Mukherjee. The defendant also has got a legal claim upon the money, she being entitled to her maintenance from out of the money. It was admitted before us in this Court that Ramani Mohan Mukherjee has not left any other money or property from out of which this minor can be maintained. So though, no specific share of the money can be declared in defendant's favour at this stage, she is entitled to be maintained out of it. In the circumstances, the proper declaration which should be made in this case is that the plaintiffs and the principal defendant are jointly entitled to the ticket and to the prize money attaching to the ticket.

On behalf of the Club an offer was made that it is ready and willing to deposit the prize money in favour of the person or persons who would be declared entitled to the same as the rightful owner. Having regard to the frame of the suit no mandatory direction can be given to the Calcutta Rangers Club for depositing the money. If however, the Club deposits the money in pursuance of its voluntary offer made in this Court, then the deposit should be made jointly in the names of the plaintiffs and the principal defendant. The money will be dealt with according to the directions given in the ordering portion of this judgment.

It now remains for me to consider how the costs of the suit should be awarded. In view of the circumstances of this case I am of opinion that all parties should bear their own costs so far as the appeal in this Court is concerned. As to the costs of the lower Court, it is directed that in view of the peculiar circumstances of this case, the plaintiffs will bear their own costs who presumably also paid the costs of the contest put up on behalf of the minor defendant. Although the plaintiffs have partially succeeded, the Rangers Club not being responsible for bringing them to Court, will get half its cost of the trial court

viz., Rs. 474/2/- and the Club will be permitted to deduct this amount from the prize money while depositing that amount in the trial court.

The cross-objection which was taken by the Club is disposed of by this order.

In the result the appeal is allowed and the judgment and decree of the Court below are set aside and the suit is decreed in a modified form. Be it declared that the plaintiffs and the principal defendant Bina Mukherjee are the rightful owners of the lottery ticket and the prize money described respectively in Schedules A and B of the plaint. If the prize money is deposited in the trial court by the Rangers Club after deducting the costs, awarded to it, the amount will be kept in deposit in that court and will not be paid to any party until a certificated guardian or guardians are appointed by a competent court in respect of the two minor plaintiffs and minor defendant Bina Mukherjee, and until suitable orders are obtained from that Court or any other competent court for disposal of the money. The question whether a succession certificate will be necessary for the disposal of the money, if deposited, will be decided by the Court passing the order for disposal of the none.

Rama Prosad Mookerjee, J.:—I agree.

S.G.P. *Appeal allowed.*

ORIGINAL CIVIL.

Before Mr. Justice R. S. Bachawat.

CIVIL.

1953

December, 11.

NATH BANK LTD. (IN LIQN.)

v.

SISIR KUMAR SARKAR.*

Set-off—A debt repayable by X under a contract with A and B to "either or survivor"—Suit by X against A to recover a separate debt due from A alone—Whether in such a suit A can set-off the debt due from X under the contract with A and B "to either or survivor"—Section 45 of the Indian Contract Act.

Contract—Section 45 of the Indian Contract Act—Whether a contract may be made with two or more persons both jointly and severally at one and the same point of time.

A debt repayable under a contract with A and B to either or survivor cannot at one and the same point of time be a debt jointly payable to A and B and also a debt severally payable to A. The normal meaning of "either" is "one or other", and the debt, therefore, is payable to one or other of them during their joint lives and thereafter to the survivor.

During the joint lives of A and B at least until due demand for payment of the money to A is made, the debt is not due severally or to the separate account of A and that at least until then it continues to be a debt jointly due to A and B. At least until such demand it is not certain that the debt is payable to either A alone or to B alone The debt cannot be due to A severally as also B serverally at one and the same point of time.

During the joint lives of A and B at least until due demand for repayment of the money to A specifically is made, the debt continues to be a debt jointly due to A and B, and the Bank cannot set-off a debt due from A alone against such debt nor can A set-off this debt against a separate debt due from him to the Bank.

Unless a contrary intention appears from the contract, a promise in favour of two or more persons is a joint promise to them all to perform the contract. Where a contrary intention appears a promise in favour of two or more persons may be a several promise to one of them to perform the whole or a severable part of it. But a promise cannot be made to two or more persons both jointly and severally.

Suit by the Plaintiff Bank to recover dues on an Overdraft account.

*Suit No. 4529 of 1951.

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1953.

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December, 11.

Set-off claimed by the Defendant.

The material facts will appear from the judgment.

P. K. Sen for the Plaintiff.

R. Chaudhury and B. B. Sarkar for the Defendant.

The judgment of the Court was as follows:—

R. S. Bachawat, J.:—This is a suit to recover the balance due on an overdraft account and for a declaration of charge and for all consequential reliefs. The only defence is a defence of set-off. The other contentions raised in the written statement are not pressed. The allegations in the plaint are admitted by the defendant's counsel.

The following issue was raised:—

1. Is the defendant entitled to a set-off as alleged in paragraph 6 of the written statement?

The defendant is admittedly a debtor of the plaintiff for the sum of Rs. 10,406-10-6 before the winding up. The order for winding up of the plaintiff bank was made on May 8, 1950.

There was a fixed deposit by Benode Behari Sarkar and the defendant. The fixed deposit receipt issued by the plaintiff bank is as follows:—

No. 30736 date of expiry the 30th March, 1950.

Not transferable.
Nath Bank Ltd.

No. Bg. 1184 Nath Bank Ltd. Ballygunge,
Branch Office, Ballygunge.
Dated the 30th March, 1949.

Nath Bank Ltd. Received from M/s. Benode Behari Sarkar and Sisir Kumar Sarkar

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Paid Rs. 400/-
on account of 1st dividend.
Sd/- Illegible, 6-12-51.

Rupees four thousand only. As a Deposit repayable 12 (Twelve) months after date with interest at the rate of three (3%) per cent per annum to Either or Survivor.

Rs. 4,000/- Cashier Sd/- Pravash Mazumdar
Accountant.
for NATH BANK LTD.
Sd/- Illegible,
Manager.

Interest will cease at the expiration of 12 months when this receipt must be sent in for payment or renewal endorsed by the Depositor. No Notice will be served by the Bank."

The fixed deposit was repayable 12 months after date to either or survivor.

The defendant and his wife Ava Sarkar had two accounts Nos. 60 and 61 called Provident Fund Pass Book Accounts with the plaintiff bank. It is admitted that in accordance with the rules of the Fund these two accounts had been made repayable to either or survivor. The total sum due in these two accounts is Rs. 1,360/-.

There is no evidence that either Benode Behari Sarkar or Ava Sarkar is dead. There is also no evidence that any demand was made by the two sets of depositors asking for repayment of the moneys in the two accounts to the defendant specifically.

The question therefore is whether in a suit by X against A to recover a separate debt due from A to X, A can set off a debt repayable under a contract with A & B to either or survivor.

There is no doubt that if the debt is a debt jointly due to A & B, A cannot set off such debt. [See *Bowyear* v. *Pawson* (1),]

(1) (1881) 6 Q.B.D. 540.

The debt due to A & B is not legally recoverable by A alone from X and cannot, therefore, be set off under Order 8, Rule 6 of the Code of Civil Procedure. In this respect in the absence of special circumstances equity follows law (Storey's Equity Jurisprudence, Art. 439). The set-off is also not permissible under Section 477 of the Presidency Town Insolvency Act read with Section 229 of the Indian Companies Act because there is no mutual credit between A and X in respect of such debt.

Lindley L.J. in *Wolstenholm* v. *The Sheffield Union Banking Co.* (1), observed:—"*Prima facie* a separate debt cannot be set off against joint debt either at law, in equity or under the mutual credit clauses of the Bankruptcy Act. There is no authority for the bankers having a general lien in such a case as the present."

It is however contended on behalf of the defendant that the debt repayable under a contract with A & B to either or survivor is a joint and several debt. Reliance is placed upon *McEvoy* v. *The Belfast Banking Co. Ltd.* (2). That case decided that where A deposits money with the bank in the name of himself and B, payable to either or survivor, B's right to claim the deposit and to sue the bank depends on whether A purported to make B a party to the contract. Lord Atkin held that B by this conduct had represented to the Bank that he did not intend to ratify the contract and that having so acted he could not afterwards ratify it and that consequently he had never become a party to the contract. Lord Thankerton held that on the evidence it was not made out that A purported to act as the agent of B. Lord Warrington and Lord Macmillan held that as between B and the executors of A the latter was entitled to retain the assets.

In course of his judgment Lord Atkin observed at p. 43 as follows:—"The contract on the face of it purports to be made with A & B and I think with them jointly and severally."

Learned counsel for the defendant relies very strongly upon this opinion. It is to be observed that this opinion was not

(1) (1886) 54 L.T. 746 at P. 748.
(2) [1935] A.C. 24.

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necessary for the decision in that case nor do the other Law Lords express their concurrence with it.

In *Sm. Shanti Mayee Debi* v. *Bengal Central Bank* (1). *McEvoy* v. *The Belfast Banking Co.* (2) was followed, where deposit was repayable to either A the husband or B the wife or the survivor. On the death of A leaving behind sons, B claimed the deposit from the bank and it was held that B was entitled to recover the amount of the fixed deposit. Chatterjee J. observed at p. 685 following Lord Atkin that the contract was a joint and several contract.

Section 45 of the Indian Contract Act is as follows:—

> "45.—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly."

Unless a contrary intention appears from the contract a promise in favour of two or more persons is a joint promise to them all to perform the contract. Where a contrary intention appears a promise in favour of two or more persons may be a several promise to one of them to perform the whole or a severable part of it. But a promise cannot be made to two or more persons both jointly and severally (Halsbury, 2nd Edn. Vol. VII Art. 95 at p. 76). *Ahinsa Bibi* v. *Abdul Kader* (3). One and the same covenant cannot be made both joint and several with the same covenantees [*Brabourne* v. *Botfield* (4)]. An interest cannot be granted jointly and severally [See *Slingsby's Case* (5)]. The same promise cannot be a joint promise to two or more and at the same time a promise to one of them. In *Mahamed Ishaq* v. *Sheikh Akramul Huq* (6). Sir Asutosh Mookerjee J. observed thus:—

(1) (1948) 53 C.W.N. 680. (2) [1935] A.C. 24.
(3) (1901) I.L.R. 25 Mad. 26 (35). (4) (1845) 14 M. & W. 559 (573).
(5) (1587) 5 Co. Rep 16b; 77 Eng. Rep. 77.
(6) (1907) 12 C.W.N. 84 (90).

"A promise by two or more persons to perform an act is a promise that they or some or one of them will perform it. [*Addison* v. *Gibson* (1)]; but a promise to two or more persons to perform an act is not a promise to them or some or one of them but a promise to them all to perform it, *Rolls* v. *Yate* (2).

The case of an agreement by one person to pay a sum to two is very different, for this does not imply an obligation to pay the sum to the separate account of any, payment to two persons and payment to one are different and inconsistent things, and a promise to two and a promise to one are equally different and inconsistent. It is obvious therefore that a right may belong to individuals severally but not to two or more jointly severally but it may belong to two or more jointly."

In my judgment a debt repayable under a contract with A & B to either or survivor cannot at one and the same point of time be a debt jointly payable to A and B and also a debt severally payable to A. If Lord Atkin has expressed a contrary opinion I respectfully dissent from that opinion.

In this case the debt is payable under a contract with A and B to either or survivor. The normal meaning of "either" is "one or other" [Per Rigby L.J. in Re: *Pickworth Case* (3)]. The debt, therefore, is payable under a joint contract with A and B to one or other of them during their joint lives and thereafter to the survivor.

It may be that either on the death of B or upon due demand for payment of the money severally to A during the joint lives of A and B the debt becomes severally due to A. It is not necessary to decide that question. I am however firmly of the opinion that during the joint lives of A & B at least until due demand for payment of the money to A is made the debt is not due severally or to the separate account of A and that at least until then it continues to be a debt jointly due to A & B. At least until such demand it is not certain that the debt is payable to either A alone or to B alone. The debt cannot be due to

(1) (1847) 10 Q.B. 106. (2) (1617) Yelverton 177.
(3) (1899) 68 L.J. Ch. 324 (328).

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A severally as also to B severally at one and the same point of time.

The case of *Hirschorn* v. *Evans* [*Barclays Bank Ltd.* *Garnishees* (1)], is instructive. In this case, a joint deposit account was opened by A & B and the Bank authorised to accept the signature of either A or B or of the survivor as a sufficient discharge for the re-payment of the moneys deposited. This debt was attached in execution of a decree against A, the husband. It was held that the judgment-creditor of A had no right to attach the debt. The Court of Appeal was unanimous in allowing the appeal brought against the decision of the county court judge. The court unanimously held that there was no evidence upon which the county court judge could find that the money in the joint account belonged solely to A. Both Slesser and MacKinnon L.JJ. held that the right of either to demand the money and the obligation of the bank to pay to either did not make the account a joint and several account (See pp. 812 and 814 of the report). Greer L.J. however, held that if the money in the account belonged solely to A, on demand or what was equivalent to a demand by A, the money became repayable to him solely.

In *Simla Banking and Industrial Co. Ltd.* v. *Bhagwan Kuar* (2), the bank had issued a fixed deposit receipt in favour of A and his wife B payable to either or survivor. In a suit by B against the bank to recover the deposit, the bank claimed to retain the moneys and asserted a lien thereon on the ground that A was severally indebted to the bank. This defence was negatived and it was held that the bank could not appropriate the amount of the fixed deposit against the debt severally due from A either in law or in equity.

In my judgment, during the joint lives of A and B at least until due demand for repayment of the money to A specifically is made, the debt continues to be a debt jointly due to A and B and the bank cannot set-off a debt due from A alone against such debt nor can A set-off this debt against a separate debt due from him to the bank.

(1) [1938] 2 K.B. 801.
(2) [1928] A.J.R. Lah. 316.

In this case admittedly no demand for repayment of the moneys to the defendant was made at any time and the debt was not due to the defendant severally at any relevant point of time. In my judgment it is not made out that the defendant is entitled to set-off the debt against the claim of the plaintiff.

This appears to be a hard case. There will be a decree for the sum of Rs. 10,406-10-6 pies and there will be a declaration of charge in terms of prayer (d). Mr. S. K. Sanyal, one of the joint Liquidators, is appointed Receiver without security and without remuneration of the assets and stock-in-trade of the defendant's business of Annapurna Atta and Oil Mills. Filing of separate accounts by the Receiver is dispensed with. The Receiver will, however, keep and maintain separate accounts and file the same along with the liquidation papers. There will be no order for interim interest. There will be interest on decree.

I direct that the decretal amount will be paid in the following instalments:

(a) The defendant will pay the sum of Rs. 500/- on or before January, 3, 1954.

(b) The defendant will pay to the plaintiff the sum of Rs. 500/- each month thereafter, the first monthly to be paid on or before February 3, 1954.

The Receiver will not take possession under this order unless and until a default in payment of two instalments is made. In default of payment of any two instalments, the entire decretal amount will become immediately payable and the Receiver will be at liberty to sell the said assets and the stock-in-trade and appropriate the sale proceeds *pro tanto* in satisfaction of the claim.

Each party will pay and bear the costs of the suit throughout. The liquidator will be at liberty to retain the costs of the suit as between attorney and client out of the assets.

B. K. Bose: Solicitor for the Plaintiff.

Nahar and Dutta: Solicitors for the Defendant.

S.G.P. *Suit decreed.*

ORIGINAL CIVIL.

Before Mr. Justice R. S. Bachawat.

CIVIL.

1958.

December, 10.

NANDRAM HANUTRAM

v.

RAGHUNATH & SONS LTD.*

Arbitration—Dispute, an essential pre-requisite to exercise of jurisdiction by Arbitrator—Dispute, whether it may also be implied—Claim by one party but silence on the part of the other, whether it constitutes a dispute between the parties.

The existence of dispute or difference contemplated by the arbitration clause is an essential condition of and pre-requisite to the exercise of the jurisdiction by the arbitrator.

A dispute implies an assertion of a right by one party and a repudiation thereof by another. But the repudiation by the other party may be either express or implied and may be by words or by conduct.

Failure to perform the contract and to pay the amount claimed may take place under such circumstances as may justly lead to the inference of repudiation and denial of the right of the other party. Such conduct and stoic silence may be more eloquent than words and may show that the party is disputing his liability coupled with other circumstances a failure to pay a claim may constitute a difference between the parties.

Application for declaring an Award null and void.

The material facts will appear from the judgment.

D. C. Sethia for the Applicant.

B. K. Chakrabarty for the Respondent.

The judgment of the Court was as follows:—

R. S. Bachawat, J.:—This is an application to declare an award to be null and void.

The arbitration clause is contained in a contract dated January 2, 1952, for sale by the respondent to the petitioner of hessian cloth delivery April to June in equal monthly instalments.

* Application for declaring an Award null and void in *re*: Suit No. 331 of 1952.

The respondent tendered the goods to the petitioner on the due dates. The petitioner failed to take delivery and thereupon on due notice to the petitioner the respondent re-sold the goods for and on account of the petitioner. Bills of difference in price were duly submitted but the petitioner did not pay those bills. The petitioner maintained an unusual silence throughout and did not send any letters to the respondent in answer to the several demands made by the petitioner.

The respondent referred its claim to the arbitration of the Bengal Chamber of Commerce on July 7, 1952. The petitioner did not file any statement before the Bengal Chamber of Commerce. The Bengal Chamber thereupon made its award on September 24, 1952.

It is contended on behalf of the petitioner that there was no dispute between the parties prior to arbitration and that therefore the Bengal Chamber had no jurisdiction to make the award. This contention is raised in paragraphs 9 and 17(c) of the petition.

The arbitration clause is as follows:—

> "13. All matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this contract whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules of arbitration shall be conducted."

There is no doubt that the existence of disputes or differences contemplated by the arbitration clause is an essential condition of and pre-requisite to the exercise of the jurisdiction by the Arbitrator.

A dispute implies an assertion of a right by one party and a repudiation thereof by another: *Chandmull Ganeshmull* v. *Nippon Munka Kabushiki Kaisha* (1).

(1) (1921) 33 C.L.J. 545.

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The repudiation by the other party may be either express or implied and may be by words or by conduct.

Failure to perform the contract and to pay the amount claimed may take place under such circumstances as may justly lead to the inference of repudiation and denial of the right of the other party. Such conduct and stoic silence may be more eloquent than words and may show that the party is disputing liability. Coupled with other circumstances a failure to pay a claim may constitute a difference between the parties. [See *James Finlay & Co.* v. *Jeshanmal R. Kripalani* (1), *Donald Graham & Co.* v. *Asumal Khushaldas* (2), *Messrs. Beith Stevenson & Co. Ltd.* v. *Firm of Naroomal Khemchand* (3), *Tyebally Abdul Hossin* v. *Messrs. James Finley & Co.* (4)].

Failure to pay under a claim of right is certainly a dispute. *Uttamchand Saligram* v. *Mahmood Jewa Mamooji* (5). The claim of right need not necessarily be express. It may and should justly be inferred against the defendant from his sphinx like silence in an appropriate case. It is not the law that a person who desires to evade arbitration may not write letters in answer to a claim explaining and justifying his conduct and then turn round and say there is no dispute.

I can well imagine that in certain circumstances the Court will not infer the existence of a dispute from a mere failure to pay (Russell on Arbitration, 14th Edn. 252). *Mathurdas Goverdhonedas* v. *Khusiram Benarsilal* (6).

If the defendant maintains complete silence in answer to demands made against him until a suit is instituted against him may have a very heavy burden of proving that there was a dispute prior to the institution of the suit necessitating a reference to arbitration when he subsequently applied for stay of the suit,

(1) (1911) 12 I.C. 188.

(2) (1901) 12 I.C. 187.

(3) [1924] A.I.R. Sind, 117 at pp. 118-119.

(4) (1924) A.I.R. Sind, 105 at p. 110.

(5) (1919) 23 C.W.N. 704.

(6) (1949) 53 C.W.N. 873 at p. 875.

Dewoodbhai Abdulkader v. *Abdulkader Ismailji* (1) or when he subsequently contends that the suit is barred by a special statute requiring previous recourse to arbitration. *London and North-Western Railway Co.* v. *Jones* (2). The circumstances however are quite different.

In *Chandmull* v. *Donald Campbell* (3), A drew bills on B on the basis of certain award made previously and binding upon A & B. B dishonoured the bills on presentation. A then made a further reference to arbitration. B did not appear before the arbitrators and an award was made against him. B then contended that the award was invalid. The House of Lords negatived the suggestion of his counsel that here was no dtispute prior to reference. Lord Sumner observed thus—"It is true that Mr. Chandanmull when required to pay in accordance with the first award, preserved a sphinx-like silence. It is true also that it takes two to make a quarrel. But a dispute may perfectly well arise when only one disputant is articulate and the other stands mute when called upon to plead. What is required is that one party should affirm and the other deny and conduct will do this as well as words. The respondents said in effect "You owe the money and have no excuse for not paying it." The appellants to my mind in effect retorted nonetheless eloquently though he held his tongue. "I owe you nothing, I have a defence under the contract."

It is suggested that the appellant really disputed nothing but simply could not or would not pay; in other words he lacked either money or honesty. My Lords, I cannot assume in Mr. Chandanmull's favour that he was wanting in either. If it be the case that no further dispute arises out of the contract when nothing capable of being disputed is to be found and nothing is alleged to be disputable, I think still that if the appellant's attitude can be explained consistantly with any recognition of his business application this should be done.

In the present case repeated demands for performance of contract were made upon the petitioner. He did not perform

(1) (1930) 33 Bom. L.R. 51.
(2) [1915] 2 K.B. 35.
(3) (1916) 23 C.W.N. 707 (foot note).

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the contract and gave no explanation for his non-performance. Repeated demands for payment of the difference was made upon the petitioner. He did not pay the amount claimed and gave no answer why he was not making the payment. The petitioner is a firm apparently of good credit. In fairness to the petitioner it is to be assumed that he was disputing his liability on some ground. I cannot assume in his favour that he was dishonestly avoiding liability or that he was insolvent. In fact even now in the petition he maintains that the admission for performance was wrongful. The exact disputes need not be specified. If the dispute is a vague one the arbitrator has jurisdiction to call upon the parties to specify the disputes. The arbitrator can order points of claim and points of defence as also particulars. The arbitration clause is very wide and confers jurisdiction upon the Bengal Chamber of Commerce to decide all matters, questions, disputes, differences and/or claims arising out of the contract. In my judgment there was a sufficient dispute or difference prior to the reference attracting the jurisdiction of the Bengal Chamber of Commerce to arbitrate upon these disputes.

It is contended that the arbitrator was not selected or appointed by the Registrar by his own hand. Reliance is placed upon Rule VI of the rules of the arbitration of the Bengal Chamber of Commerce, Rule VI is as follows:—

> "VI. Unless the agreement to refer the dispute or difference to the Chamber or Tribunal otherwise expressly provides the Court shall consist of two arbitrators, who shall be selected by the Registrar from the Tribunal and appointed in writing under his hand."

The argument here has proceeded upon the footing that the selection and appointment in writing was made under the hand of one Mr. S. J. Philips. Mr. Sethia on behalf of the petitioner has conceded and formally admitted that Mr. Philips was at the relevant time a member of the secretarial staff of the Chamber and acting for him at the relevant time.

Rule 1(6) of the Rules of Arbitration of the Bengal Chamber of Commerce is as follows:—

"1(6). "Registrar"—The Registrar of the Tribunal shall be the Secretary for the time being of the Chamber or such other member of the Secretarial staff of the Chamber as shall be acting for him from time to time."

On the admission made by Mr. Sethia it must be held that Mr. Philips was at the relevant point of time for the purpose of appointment and selection of arbitrators the Registrar and as such the appointment and selection of the arbitrators were duly made in accordance with rules VI.

It is next contended that the arbitrators were guilty of misconduct because they refused to give an opportunity to the petitioner to submit its statement. This contention is raised in paragraph 17(e) and paragraph 10 of the petition. I am satisfied that the petitioner had ample opportunity to place its case before the Bengal Chamber and there is no substance in the present contention.

The contention raised in paragraph 17(d) is not pressed and expressly abandoned by Mr. Sethia.

The only dispute therefore now outstanding for adjudication is that raised in paragraph 17(a) and paragraphs 3, 4, 5 and 6 of the petition.

I adjudge and declare:—

(a) That the award is not bad on the ground that there was no dispute between the parties prior to the reference.

(b) That the award is not bad on the ground that the arbitrators were not duly selected and appointed in accordance with the rules of the Bengal Chamber of Commerce.

The petitioner must pay the costs of hearing of yesterday which I assess at 5 G. ms.

The disputes raised in paragraph 17A and paragraphs 4, 5 and 6 remain outstanding. I make cross order for discovery

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against both parties. Affidavit of documents shall be filed within one month to-day disclosing all documents and books of accounts, bill books and contract register, if any, material to the case and in particular all entries in books of account, bill books and contract registers for three years preceeding the 2nd January, 1952, (a) relating to the sale and purchase and delivery of jute goods and (b) relating to the godown and other means and equipments necessary for the storage and supply of jute goods, if any, in possession and control of the parties. There will be an inspection forthwith thereafter. Within two months thereafter the respondent shall file a further affidavit annexing thereto copies of all documents and all the entries in books of accounts relied upon by the respondent, and stating further facts, if any relied on by him. Where the entry is in vernacular language a translation either official or non-official thereof shall be annexed to the affidavit. If the respondent desires to call any further witness, the respondent shall as far as possible procure an affidavit from such witness and file such affidavit, within a fortnight thereafter the petitioner shall file a further affidavit annexing to such affidavit copies of all documents and entries in the books of account relied on by him and further facts if any relied on by him. Where the document is in vernacular language a translation either official or non-official thereof shall be annexed to the affidavit. If the petitioner desires to call any other witness, the petitioner shall as far as possible procure an affidavit from such witness and file the same. The matter will appear in the list for hearing on the 3rd April, 1954. I leave it open whether the Court will decide the disputes then on affidavits or whether the Court will then take oral evidence. The parties must however be ready with all oral evidence on that date. The matter is adjourned until the 3rd April 1954 for adjudication of the outstanding disputes.

I direct that the matter be not treated as part heard before me.

Liberty to apply.

L. P. Agarwalla & Co.: Solicitors for the Petitioner.

Khaitan & Co.: Solicitors for the Respondent.

S.G.P. *Application disallowed.*

CRIMINAL REVISION.

Before Sir Arthur Trevor Harries, Chief Justice, and Mr. Justice S. R. Das Gupta.

KANAI HIZRA & ORS.

v.

GOLAP HIZRA.*

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March, 26.

Criminal Procedure Code—Section 403—Bar to second prosecution on same set of facts—Acquittal—Whether acquittal under Section 247 of the Criminal Procedure Code bars fresh prosecution.

It is an erroneous view to hold that an acquittal on a preliminary ground would not for a fresh trial under Section 403 of the Code of Criminal Procedure on the same set of facts or for the same offence. An acquittal under Section 247 of the Code of Criminal Procedure is an acquittal which would bar a further trial under Section 403 of Cr. P. C.

Application for revision by all the Accused.

Fresh prosecution by the Complainant on the same facts.

The material facts will appear from the judgment.

S. S. Mukherjee for the Petitioners.

Gurudas Bhattacharjee for the Opposite Party.

The judgment of the Court was as follows:

S. R. Das Gupta, J.:—This is an application for revision of an order passed by a learned Sessions Judge affirming the order of the Sub-Divisional Officer and a Magistrate, First Class Chinsurah issuing Process under Section 323 of the Indian Penal Code against the Petitioners.

The matter arises in this way on June 4, 1951 one Gopal Hizra filed a petition of complaint before the Sub-Divisional Officer, Hooghly. The allegations in the petition of complaint are as follows. On May 29, 1951 the complainant was requested by some of the accused to attend a *Salish* to have a case pending in the Criminal Court of Alipore between Kanai and himself

* Criminal Revision Case No. 1017 of 1951.

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compromised. As such on that date the complainant proceeded from Howrah to Baidyapur by train to attend this *salish*, while he got down from the compartment of the train at Bandel Station all the three petitioners hit the complainant with an iron rod, brickbat and a broomstick. On this complaint a process was issued by the Sub-Divisional Officer, Chinsurah before whom the complaint was made and the petitioners were summoned under Section 352 of the Indian Penal Code and the case was fixed for examination of the complainant on July 3, 1951. On that date that is on July 3, 1951, the complainant did not turn up and thereupon the learned Magistrate directed the accused to be acquitted under Section 247 of the Code of Criminal Procedure. Thereafter on July 4, 1951 another complaint was made on the self-same facts on which the previous complaint was made and his plea was that when the case was called on on the previous day he had just been away from the Court premises and he asked for process against the accused. That petition came up for hearing before Mr. N. R. Banerjee, Magistrate Chinsurah, who was at the that time taking the files of the Sub-Divisional Officer. He examined the complainant but in his opinion a complaint was made on the same occurrence as was filed before the Sub-Divisional Officer on June 4, 1951 and on which the accused were summoned under Section 352 of the Indian Penal Code and subsequently acquitted under Section 247 of the Code of Criminal Procedure and the present complaint was a duplication of the complaint dated June 4, 1951 and cannot be entertained according to law. He however did not make any order but put up the matter before the Sub-Divisional Officer for his orders. The learned Sub-Divisional Officer on July 9, 1951, took a rather strange view of this matter. Although the previous complaint was dismissed and the accused was acquitted, yet he held that in the previous case process had been wrongly issued under Section 352 of the Indian Penal Code and that it should have been issued under Section 323 of the Indian Penal Code and he consequently issued a process on the self-same facts under Section 323 of the Indian Penal Code.

Against that order of the learned Magistrate the petitioners preferred an appeal to the Sessions Judge but the learned Session Judge took the view that the order of the learned Magistrate was in order and he affirmed it. The petitioners

have made the present application before us in revision against the said order of the learned Sessions Judge affirming the order passed by the Sub-Divisional Officer, Chinsurah.

It seems to us that both the learned Magistrate and the learned Sessions Judge have taken an entirely erroneous view of the matter. The petitioners were aquitted under Section 247 of the Code of Criminal Procedure which provides—

"If the summons has been issued on complaint and upon the day appointed for the appearance of the accused or any day subsequent thereto which the hearing may be adjourned the complainant does not appear, the Magistrate shall, not withstanding anything herein before contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day."

The Sub-Divisional Officer, Chinsurah, purported to act under this Section and the complainant not having been present he acquitted the accused. But once an accused is acquitted he is not liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236 of the Code of Criminal Procedure or for which he might have been convicted under Section 237 of the Code of Criminal Procedure. This is laid down in Section 403 of the Code of Criminal Procedure. Section 403 provides as follows:

"A person who has once been tried by a court of competent jurisdiction for an offence and convicted on acquitted of such offence shall, while such conviction or acquittal remains in force not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236 or for which he might have been convicted under Section 237."

Sections 236 and 237 of the Code of Criminal Procedure provide as follows—

"Section 236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts

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which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once, or he may be charged in the alterative with having committed some one of the said offences.

Section 237. If, in the case mentioned in Section 236, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section he may be convicted of the offence which he is shown to have committed although he was not charged with it.

(2) When the accused is charged with an offence he may be convicted of having attempted to commit that offence although the attempt is not separately charged."

In this case the facts on which the two petitions of complaint were presented are indentical when the first petition of complaint was presented process was issued under Section 352 of the Indian Penal Code. It appears to us that on those facts process might have been issued and the petitioner might have been charged for an offence under Section 323 of the Indian Penal Code. It also appears to us that the facts alleged in the said two petitions of complaint make it doubtful which of the said offences namely section 352 and or Section 323 the facts when proved will constitute. In our opinion he might have been charged either under Section 323 or Section 352 or both or in the alternative In this case as I have indicated the same facts have been alleged in both the petitions of complaint and the matter clearly falls under Section 236 of the Code of Criminal Procedure. That being so under Section 403 Cr. P. C. no fresh processes could be issued against the petitioner under Section 323 of the Indian Penal Code on the second petition of complaint. In the case of *Kapton v. G. M. Smith* (1), a Bench of this Court has also held that a person tried and acquitted on a charge of using criminal force under Section 352 cannot be tried in respect of the same criminal matter on a charge of hurt. It appears that the learned Sub-Divisional

(1) (1871) 16 W.R (CR.) 3.

Officer as well as the learned Sessions Judge have taken the view that the acquittal as contemplated in Section 403 of the Code of Criminal Procedure means an acquittal after a trial. In other words the view they have taken is that an acquittal on a preliminary ground would not bar a fresh trial under Section 403 of the Code of Criminal Procedure on the same facts or for the same offence. In our opinion that view is entirely erroneous and is contrary to the definite views which have been expressed in this Court in two decisions one in the case of *Sakun Ramkoch* v. *Krishna Dev Sarma* (1); and the other in the case of *Bhupati Bhusan Mukherjee* v. *Amio Bhusan Mukherjee* (2). In those cases their Lordships have made it perfectly clear that an aquittal under Section 247 of the Code of Criminal Procedure is an acquittal which would bar a further trial under Section 403 of the Code of Criminal Procedure. Lort Williams, J. has further observed "that the procedure under Section 247 at whatever stage of the proceedings it may be applied whether before or after the summons has been served or the accused has appeared or the particulars of the offence have been stated to him is a trial within the meaning of Section 403 of the Code of Criminal Procedure. There seems to us to be no room for doubt that is the position both on the plain meaning of the Section 403 as also on the authority of the two decisions to which I have just now referred.

It is difficult to see how the Sub-Divisional Officer or the Sessions Judge could come to a contrary conclusion.

In our opinion therefore the proceedings which have been started as a result of the fresh petition of complaint made on July 9, 1951, cannot go on and must be quashed.

The result therefore is that the Rule is made absolute and the proceedings before the Sub-Divisional Officer, Chinsurah, should be quashed. The petitioners if on bail will be released from their bail bonds.

Harries, C.J.:—I agree.

S.G.P. *Rule made absolute.*

(1) (1928) 33 C.W.N. 260. (2) (1935) 39 C.W.N. 919.

CRIMINAL REVISION.

Before Mr. Justice K. C. Chunder.

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March, 21.

BHOLANATH ROY

v.

RANIGUNGE MUNICIPALITY.*

Bengal Municipal Act—"Magistrate," definition of—Section 3(54) of the Bengal Municipal Act—Offences under Bengal Municipal Act to be tried by Magistrates as defined by that Act.

Where for an alleged offence under the Bengal Municipal Act, the accused was tried and convicted by a Magistrate as defined in the Criminal Procedure Code but who did not come within the definition of a Magistrate as defined in the Bengal Municipal Act :

Held—The Magistrate had no jurisdiction to try an offence under the Bengal Municipal Act, and such an offence can be tried only by a Magistrate coming within the definition of "Magistrate" as laid down in that Act.

Revision application by the Accused.

Conviction for an offence under the Bengal Municipal Act.

The material facts will appear from the judgment.

Arun Prakash Chatterjee for the Petitioner.

S. S. Mukherjee and Kishore Mukherjee for the Respondent.

The judgment of the Court was as follows:—

K. C. Chunder, J.:—This Rule was issued at the instance of the petitioner who has been convicted and fined by a first class Magistrate under Section 503 of the Bengal Municipal Act read with Bye Law 25 framed under the provisions of the Bengal Municipal Act. The definition of Magistrate in Section 3(54) of the Bengal Municipal Act is the District Magistrate, the Magistrate in charge of a Division of the District in which Division a Municipality is constituted and every Magistrate of the

* Criminal Revision No 1283 of 1951.

first class subordinate to the District Magistrate to whom the District Magistrate may have made over any duties under this Act. It is not disputed that the Magistrate who tried this case had not been specially empowered by the District Magistrate with the duties of trying cases under the Bengal Municipal Act or this particular case under Section 5(2) of the Code of Criminal Procedure. The Special definition of the Magistrate will be attracted to the Class of Court which will try offence under the Bengal Municipal Act under the Second Schedule of the Code of Criminal Procedure. Therefore Magistrate will have to be read in the Second Schedule of the Code of Criminal Procedure in the light of the definition of Magistrate as given in Section 3(54) of the Bengal Municipal Act. Mr. Sudhansu Sekhar Mukherji appearing on behalf of the Municipality has drawn my attention to the word "includes" which he points out is not the same as means, "Includes" in this context has the significance of excluding other class of Magistrates. Under the circumstances the case was not tried by a proper court and therefore as the learned Magistrate had no jurisdiction to try, the conviction and sentence must be set aside.

It may be pointed out that the order of daily fine also is not proper. There must be first disobedience of the order and in the subsequent proceedings the Court must find that there has been such daily disobedience. Therefore the order imposing a fine and a daily fine cannot be passed together if after the order imposing a fine is passed the offender still persists in committing there must be fresh proceeding a fresh finding and a fresh conviction. Mr. Mukherjee has conceded that he cannot support the order of daily fine. Under the circumstances the Rule is made absolute. The conviction and sentence are set aside and the case is sent back for re-trial by a proper Magistrate as mentioned in section 3 Clause (54) of the Bengal Municipal Act. The fines if paid will be refunded.

S.G.P. *Rule made absolute.*

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice G. N. Das and Mr. Justice D. B. Mookerjee.

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May, 12.

PANDIT SRINIVAS KHEDWAL

v.

THE STATE OF WEST BENGAL.*

West Bengal Premises Requisition (Temporary Provisions) Act 1947—Requisition of premises under Section 3(1) of the Act—Mala fide of requisition order, burden of proof—"Public purpose," whether a justiciable issue—Omission to specify the public purpose, whether makes the order invalid—Article 31 of the Constitution.

The burden of proving whether an order of requisition is mala fide or not rests on the party alleging it.

The West Bengal Premises Requisition (Temporary Provisions) Act 1947 is a piece of legislation passed beyond 18 months of the Constitution and as such was an existing law within the meaning of Article 31(5) of the Constitution. The constitutionality of such an Act cannot be cavassed and questioned in the light of Article 31(2) of the Constitution on a true construction of Section 3(1) of the Act the factual existence of a public purpose depends entirely on the subjective satisfaction of the Provincial Government and is not justiciable.

Since existence of a public purpose depends entirely on the satisfaction of the Government and is not justiciable, mere omission to specify the public purpose in the requisition order does not necessarily make the order invalid, more so when the party may obtain the necessary information by appropriate means. A mere statement in the order that the premises are needed or are likely to be needed for a public purpose is sufficient.

Appeal by the Applicant.

Application under Article 226 of the Constitution (certiorari).

Requisition order under Section 3(1) of the West Bengal Premises Requisition (Temporary Provisions) Act 1947.

The material facts will appear from the judgment.

* Appeal from Original Order No. 176 of 1951 against the order of *H. K. Bose, J.* dated 7-5-51.

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R.C.Deb A. C. Bhabra for the Appellant.

S. M. Bose, Advocate General with *A. K. Sen*, Junior Standing Council for the Respondent.

The judgment of the Court was as follows:—

G. N. Das, J.:—This is an appeal by Pandit Srinivas against a judgment of Bose, J., dated the 7th of May, 1951, dismissing an application filed by the appellant under Article 226 of the Constitution of India for the issue of a writ of certiorari for quashing an order of requisition dated the 31st of October, 1950, made by the Assistant Secretary, Government of West Bengal, under Section 3(1) of the West Bengal Requisition (Temporary Provisions) Act, 1947, hereinafter called the Act in respect of three rooms on the first floor in the South-West Wing of Premises No. 11, Vivekananda Road in the City of Calcutta.

One Bhajanlal Khedwal died on the 9th of April 1942, leaving him surviving his widow Ram Deyi and three sons, Srinivas, the appellant, Bhuramull and Babulal.

On Bhajanlal's death the said Premises No. 11, Vivekananda Road, vested in the appellant Srinivas and his two brothers, Bhuramal and Babulal.

On the 18th of November, 1947, an order of requisition was made by the 1st Land Acquisition Collector, Calcutta, under the provisions of West Bengal Premises Requisition and Evicting Ordinance, 1947, in regard to the said three rooms in the West wing of the first floor of the aforesaid premises. Shortly thereafter, on the 11th of December, 1947, another order was made by the 1st Land Acquisition Collector in regard to the said rooms under the said Ordinance. The appellants allegation is that after the said order of requisition one Santosh Chand Sucheti, who according to the appellant, is an employee of Hindusthan Motor Works Limited, was put in possession of the requisitioned premises. The appellant moved the Board of Revenue against the said order of requisition. On the 23rd of February, 1948, the said orders of requisition were set aside by the Board of Revenue *inter alia* on the ground that it was

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suspected that the said orders of requisition were obtained by misrepresentation. On the 5th of March, 1948 the appellant wrote a letter to the Government for possession of the requisitioned premises. This was followed by another letter dated the 21st of June, 1948, written by Messrs. B. M. Bagaria, Solicitors, purporting to act on behalf of the appellant. On the 30th of June, 1948, the 1st Land Acquisition Collector wrote to Messrs. B. M. Bagaria to the effect that a reference had been made to the Government in this behalf. On the 10th of August, 1948, another letter was written by the 1st Land Acquisition Collector to the appellant for fixation of rent of the requisitioned premises. This was followed by another letter dated the 19th of August, 1948, proposing an amicable settlement of the compensation to be paid for the requisitioned premises. On the 20th September, 1948, the appellant issued a notice under Section 80 of the Code of Civil Procedure on the State Government claiming restoration of possession of the requisitioned premises and damages. On the 23rd of November, 1948, a suit being Suit No. 1336 of 1948 was filed by the appellant's brothers for partition of certain properties including the said premises No. 11 Vivekananda Road, on the 30th of November, 1948, the Land Acquisition Collector wrote a letter to the appellant informing him that compensation for the requisitioned premises has been fixed at Rs. 65/- per month. In the said partition suit an official receiver was appointed on the 3rd of December, 1948. On the 10th June, 1949, the 1st Land Acquisition Collector wrote to the appellant's solicitor for a discussion as regards the restoration of possession of the requisitioned premises. This was followed by another letter dated the 30th of November, 1949, for settling an estimate of costs to be incurred for the filing of a suit for recovery of possession of the requisitioned premises. It appears that thereafter on account of disputes between the brothers no steps were taken for filing a suit for recovery of possession of the requisitioned premises. On the 29th of August, 1950, the Official Receiver asked the appellant to obtain directions from the Court in this behalf. In pursuance of this request the appellant made an application for directions from the Court on the 21st of December, 1950. In the meantime, on the 31st of October, 1950, an order of requisition was made by the Assistant Secretary, Government of West Bengal, under Section 3(1) of the West Bengal Premises (Temporary Provisions) Act, 1947 (Act V of

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1947), requisition the aforesaid three rooms in the south-west wing of the said premises No. 11, Vivekananda Road, which was alleged to be in the possession of Santosh Chand Sucheti. On the 30th of November, 1950 a notification was published in the Calcutta Gazette. On the 19th December, 1950, a copy of the order of requisition aforesaid was served on the Official Receiver. The latter sent a copy of this notice to the appellant. On the 22nd of January, 1951, the appellant moved this Court for the issue of a Writ of certiorari for quashing the order of requisition made on the 31st of October, 1950, and obtained the present Rule. This Rule was heard by Bose, J. and by his order dated the 5th of May, 1951, the Rule was discharged. The appellant has accordingly preferred this appeal.

Mr. Deb, learned Counsel appearing on behalf of the appellant has contended that the order of requisition was really made in the interest of Santosh Chand Sucheti who is alleged by the appellant to be employee of Hindusthan Motor Works Limited, and that the order is mala fide.

In support of his contention learned Counsel has drawn our attention to the events which preceded the said order of requisition. He has also referred us to the definite allegations made by his client in the petition under Article 226 of the Constitution wherein it was stated that the requisition was not made bonafide and that Santosh Chand Sucheti was put in possession on the strength of the first order of requisition made in November, 1947 and has since continued in possession. It was pointed out that the allegations made in the affidavit were vaguely denied in the affidavit in opposition filed on behalf of the State. It was also pointed that in the affidavit in opposition on behalf of the State it was generally stated that requisition was made for the purpose of housing an officer of the State Government. It was also pointed out that the order of requisition did not specify the particular public purpose for which the order of requisition was made.

Bose J. has observed that though the facts of this case raise a suspicion in the mind of the Court, the affidavits, read in the light of the events which preceded the present order for re-

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quisition do not prove that the order for requisition was made mala fide.

It must be remembered that the burden of proving whether an order for requisition is mala fide or not rests on the party alleging it. The events referred to above and the statements in the affidavits to which our attention has been drawn do not, in my opinion, necessarily lead to the conclusion that the order for requisition was mala fide. It must be observed that the Government entered into negotiations with the appellant for taking steps for evicting Santosh Chand Sucheti who was in wrongful occupation of the premises. It also appears that no effective steps could be taken for evicting Santosh Chand Sucheti because the appellant and his brothers fell out and the necessary directions could not be obtained from the Court requiring the Official Receiver to take steps in this behalf. It also appears from the judgment of Bose J. that at the time of the hearing of the application under Article 226 of the Constitution a letter was produced on behalf of the State which showed that the order for requisition was made for accommodation of an Inspector in the employment of the Education Department of the State. In this Court the learned Advocate General who appeared on behalf of the State offered to produce the file for inspection by the learned Counsel for the appellant. This offer was not accepted. In these circumstances, it is, in my opinion, difficult to hold that the view taken by Bose J. is not correct. The first contention raised on behalf of the appellant that the order for requisition was invalid because the materials on record do not show that the requisition was made for a public purpose. It was contended that the question whether a requisition has been made for a public purpose or not is justiciable and the Court is required to investigate this matter on an application made under Article 226 of the Constitution.

Bose J was of the opinion that this issue was not a justiciable one and in this view he did not go into the question whether the requisition was in fact made for a public purpose or not.

The question therefore arises whether, where an order for requisition is made under the Act, it is open to the Court to

enquire on an application under Act 226 of the Constitution whether in point of fact the requisition was made for a public purpose.

The material portion of Section 3(1) of the Act is in these terms: "Whenever it appears to the Provincial Government that any premises in any locality are needed or are likely to be needed for any public purposes, it may by order in writing requisition such property." This is followed by a proviso which contains an exception in favour of premises used exclusively for the purpose of religious worship. We are not concerned with the proviso in the present case. On a plain reading of Section 3(1) the question whether a requisition order is made for public purpose or not depends on the satisfaction of the Provincial Government. This question was considered by this Court in the case of *A. C. Mohammad* v. *Sailendra Nath Mitra* (1). In that case a Bench of this Court (Harries C.J. and Banerjee, J.), in a case of requisition under Section 3 of the present Act came to be of the opinion that the question whether the premises were required for a public purpose or not depended entirely on the satisfaction of the provincial Government.

The question also came to be considered in the case of *Province of Bombay* v. *Kushaldas Advani* (2), which was a case of a requisition under Section 3 of the Bombay Land Requisition Ordinance (Ordinance V of 1947). The relevant portion of that section was in these terms: "If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by an order in writing requisition land for any public purpose . . . . . ." The majority view in the case cited was that the question whether there was factual existence of a public purpose was not justiciable by the Court but depended entirely on the subjective satisfaction of the Provincial Government.

In this connection I may refer to the following observations of Das J. at page 715. When the legislative leaves it to an executive authority to form an opinion on or to be satisfied about such a matter as a condition for the exercise of any power

(1) (1950) 54 C.W.N.
(2) (1950) 1 S.C.R. 621. 621.

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conferred on it and to act upon such opinion, what is condition precedent is not the actual existence of the matter but the subjective opinion or satisfaction of the executive authority that it exists."

In the case of *A.K. Gopalan v. The State of Madras* (1) which was a case of detention under Section 3 (1) of the Preventive Detention Act, 1950, where the relevant words were "the Central Government or the State Government, If satisfied" it was held that the question of satisfaction of the Central Government or the State Government was entirely subjective.

It is however contended that the effect of Article 31(2) of the Constitution and item No. 33 in list I and item No. 36 in list II of the 7th Schedule of the constitution is to make the existence of public purpose justiciable. Reliance is placed on a Bench decision of this Court in *West Bengal Settlement Kanungo Co-operative Credit Society v. Mrs. Bela Banerjee* (2) in support of the contention that the existence of a public purpose is justiciable. Section 6 provides for a declaration by the Provincial Government that any land within the notified area is needed for a public purpose. Section 8 then provides that a declaration under Section 6 is conclusive evidence of the land being needed for a public purpose. The expression "public purpose" is defined in Section 2(d). In the case cited it was urged that the effect of Art. 31(1) of the Constitution entiled the Court to investigate the question whether the provisions contained in Section 6 and Section 8 relating to the existence of a public purpose and that as such the relevant portions of Section 6 and Section 8 to the contrary effect were *ultra vires* or not. I may refer to the observations of Harries C.J. at page 800 : It might be contended that where it is said that if a State Government is satisfied that land is required for a public purpose there is no objective test and therefore the satisfaction of the State Government would conclude the matter. That might or might not be the true construction of such words. But since the Constitution came into force we have to consider whether such legislation is permissible or not."

(1) (1950) S.C.J. (C.W.N.) 407.

(2) (1951) 55 C.W.N. 778.

In repelling the contention urged by the learned Advocate General in that case that the satisfaction of the Provincial Government is not justiciable, Harries C.J. further observed as follows: "But it seems to me clear from Clause 2 of Article 31 and the three items in the three lists of the 7th Schedule to which I have referred that it is open to the Courts to scrutinise Acts empowering Government to acquire property compulsority and to consider whether or not such Acts go beyond the powers given to the various Legislatures by the Constitution (page 799)." The above passages and certain others occurring in the said decision merely lay down that the existence of a public purpose is justiciable in order to judge the constitutionality of the legislation in question in the light of the express provisions of Article 31(2) of the Constitution. Article 31(2) of the Constitution, it may be pointed out, provides that no property shall be taken possession of or acquired for public purposes under any law which does not provide for payment of compensation. The fundamental requirement of the Article, it may be conceded, is existence of a public purpose and it is this fact, which renders the factual existence of a public purpose dependent on the satisfaction not of the Government but of the judiciary. It may be observed that the West Bengal Land Planning and Development Act, 1948, was passed within 18 months of the Constitution without the requisite certificate from the President. As such this piece of Legislation could not be regarded as existing law and excepted by Clause 5 of Article 31 from the operation of Clause 2 of Article 31 with the result that the constitutionality of the legislation could be gone into by the Court.

The position is however different in the present case which relates to the West Bengal Premises Requisition (Temporary Provisions) Act 1947. This Act was passed beyond 18 months of the Constitution and as such was an existing law within the meaning of Article 31(5) of the Constitution. The constitutionality of this Act could not be canvassed and the reasons which implied a Bench of this Court in *Bela Banerjee's case* (1) already cited, to hold that the existence of public purpose is justiciable do not apply to the facts of this case. This position was accepted as correct by a Bench of this Court (Harries C.J.

(1) (1951) 55 C.W.N. 778.

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and Banerjee J.) in the case of *Sudhindra Nath Dutt* v. *Sailendra Nath Mitter* (1).

It was pointed out that the amending Act IV of 1949 has amended Section 3(1) of the Act and has added the following words "either with or without any or all of the furniture, if any, in such premises after the word premises." It was contended that the effect of the amending Act which was passed within 18 months of the Constitution was to entitle the Court to consider the constitutionality of the entire Section (3) (1) of the Act. In my opinion, this argument cannot be accepted. The amending provisions of the Act, the constitutionality of the parent Act cannot, therefore, be questioned in the light of Article 31(2) of the Constitution (see the *State of Bombay* v. *Heman Santilal Aleeja* (2). Our attention was drawn to two later decisions of Bose J. in the cases of *Abdul Hamed v. State of West Bengal*(3), and *Phanibhusan Mondal v. B. L. Ghose* (4). These decisions proceed on *Bela Banerjee's case* (5) referred to above and on a Bombay case to which I shall refer hereafter. I have already pointed out that *Bela Banerjee's case* (5) is distinguishable and as such the decisions of Bose J. rest on sound foundations. In my opinion, therefore, on a true construction of Section 3(1) of the Act the factual existence of a public purpose depends entirely on the subjective satisfaction of the Provincial Government and is not justiciable. The view taken by Bose, J. in the judgment appealed from is therefore correct. The Second contention raised on behalf of the Appellant must therefore fail.

It was further contended that the omission to specify the public purpose in the order for requisition renders the order invalid. The reason suggested is that such a specification of the public purpose is necessary in order to enable the person whose property has been requisitioned to call in question the validity of the order in appropriate proceedings. In my opinion, this is hardly a valid ground for holding that the specification of the public purpose is requisite. The Act does not expressly contain any such provision. It is always open to a party to obtain the requisite information by appropriate means. The fact that an

(1) (1951) 87 C.L.J.140.
(2) (1952) A.I.R. Bom. 16.
(3) (1952) 89 C.L.J. 268
(4) (1953) 57 C.W.N. 342.
(5) (1951) 55 C.W.N. 778.

appeal is provided for in Section 8 of the Act does not render the specification of the public purpose necessary. The appeal provided for in Section 8 has a very limited scope and has no reference to the nature of the public purpose for which the requisition was made. I have already pointed out that the factual existence of a public purpose is not justiciable. Section 6 of the Act permits the State to use the requisitioned premises for any purpose it may deem expedient. I therefore fail to see any valid ground for holding that mere omission to specify the public purpose in the order for requisition renders the order invalid. Reliance is however placed on the decision in the case of *The State of Bombay v. Mohanlal Kapur* (1). In this case the order of requisition dated December 12, 1950 was in these terms; "Whereas, on enquiry it is found that the premises specified below had been vacant on or after the month of April, 1950, now therefore in exercise of the powers conferred by Clause (a) of Sub-Section (4) of Section 6 of the Bombay Land Requisition Act, 1948 the Government of Bombay is pleased to requition the said premises." It was held by a Bench of the Bombay High Court that the Order for requisition was bad inasmuch as it did not state the purpose of the State or any other public purpose for which the requisition was made. It was observed by Chagla C.J. that the existence of the public purpose was the foundation of the proceedings and an omission to specify the purpose rendered the order for requisition invalid.

The decision cited is clearly distinguishable. In the first place, in the order for requisition which I have quoted there was no mention at all of the existence of any purpose, State or public. In the second place, the language of Section 6(4) of the Bombay Act is different from the language of the West Bengal Act with which we are concerned. Section 6(4) of the Bombay Act runs as follows: "Whether or not an intimation is given under Sub-section 1 and notwithstanding anything contained in Section 5 the State Government may by order in writing (a) requisition the premises for the purpose of the State or any other public purpose and may deal with the premises for any such purpose in such manner as it may appear to it to be expedient."

(1) (1952) I.L.R. Bom. 597.

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It must be noted that Section 6(4) does not use words like "if the Provincial Government is satisfied or if in the opinion of the Provincial Government." The Section, as it stands, contemplates the existence of a public purpose or a purpose of the state as requisite for the making of an order for requisition. In the two decisions of Bose J. to which I have referred, it does not appear that the attention of the learned judge was drawn to the difference in the language between the Bombay Act and the West Bengal Act. In my opinion for the reasons given it is not necessary that the order for requisition should specify the public purpose for which the order was made. A mere statement in the order of requisition that the premises are needed or are likely to be needed for a public purpose is sufficient. The third ground raised on behalf of the appellant must, therefore, fail. For the reasons given above, this appeal fails and is dismissed with costs of the hearing before this Bench.

Certified for two counsel.

Debabrata Mookerjee, J.:—I agree.

B. M. Bagaria: Solicitor for the Appellant.

N. C. Mitra: Solicitor for the Respondent.

S.G.P. *Appeal dismissed with costs.*

CIVIL REVISION.

Before Mr. Justice K. C. Chunder.

NANI GOPAL CHATTERJEE

v.

HARENDRA KUMAR CHAUDHURY.*

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February, 17

West Bengal Premises Rent Control Act, 1950—Section 7—Refund of excess rent, when can be allowed—Suit for refund of excess rent, if lies in ordinary Civil Court.

There is no power in the Rent Controller to make an order of refund except under Section 7 of the West Bengal Premises Rent Control Act, 1950. In order to make an order of refund under that Section there must be a separate application for the same within six months of the time of payment.

As the landlord had received from the tenant money he was not in law entitled to, the tenant could recover the money under the general law. Therefore a suit for refund of the money was maintainable in an ordinary Civil Court.

Application for revision under Section 25 of the Provincial Small Causes Court Act.

Suit for refund of excess rent instituted in Small Causes Court.

The material facts will appear from the judgment.

Bhupal Chandra Roy Chaudhury for the Petitioner.

Prafulla Kamal Das and Bon Behari Sen Gupta for the Opposite Party.

The judgment of the Court was as follows:—

K. C. Chunder, J.:—This Rule was issued at the instance of a landlord against whom a decree has been passed by a Court

* Civil Revision Case No 2788 of 1952, against the decree passed in Small Causes Court Suit No 71 of 1952 of the Court of the S.C.C. Judge at Bongaon, 24-Parganas, dated, 30-8-52.

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of Small Causes for refund of excess rent received by him. The tenant went to the Rent Controller for fixation of rent at a much lower amount than that paid by him and the amount was fixed from July 1, 1949. The Rent Controller very wrongly and illegally made an order that the landlord has to refund that amount. There is no power in the Rent Controller except under Section 7 in a rent fixation case to make an order. In order to make an order of refund under that Section there must be a separate application for the same within six months of the time when the money is first paid. When the money was first paid the rent had not been fixed and therefore no question arises of any amount not due being taken by the landlord. The Small Causes Court Judge in the present case has very rightly held that refund could not be ordered by the Rent Controller. He had very rightly pointed out that as the landlord had received the money from the tenant he was not in law entitled to, the tenant could under the general law recover back the money which the landlord had received from him and to which the landlord had no claim. He, therefore rightly ordered the refund of that amount not under Section 7 of the Rent Control Act but under the general law of the land. The decision was perfectly right.

This Rule is discharged with costs.

S.K.R. *Rule discharged.*

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Phanibhusan Chakravartti, Chief Justice and Mr. Justice S. R. Das Gupta

SOHONLAL NAGARMULL

v.

MANICK LAL SEAL.*

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January, 18.

Original Side Practice—Notice of motion of application to set aside ex parte decree—When deemed to be filed in Court.

Ex parte decree—Application for setting aside—Limitation for—Article 164 Limitation Act—Application affirmed and Master's summons taken—When to be taken to have been held in Court.

A "notice of motion" is only a notice that a motion will be made; it is only an intimation to the opposite party required under Rule 4 of Chapter 20 of the Original Side Rule.

When after a notice of motion has been filed in the Registars' Office and pursuant thereto, the motion is included in the Paremptory List of the Judge and it being called on the Court makes an order, the application is then made to the Court. When the Court is asked to adjourn the hearing of the application or to give leave to the parties to file affidavits on a subsequent date, the application is brought to the notice of the Court and the Court is moved in regard to it, so that the application is made.

Abdul Gani v. David Jacob (1) *discussed.*

Sree Chand Daga v. Sohonlal Daga (2) discussed.

Debendra Nath Dutt v. Sm. Satyabala Dassi (3) discussed.

Appeal by the Defendant.

Application to set aside an *ex parte* decree.

The material facts will appear from the judgment.

* Appeal from Original Order No. 70 of 1952, against an order of *P. B. Mukharji, J.* arising out of Suit No. 4446 of 1950.

(1) (1953) 57 C.W.N. 313.
(2) ( ) 47 C.W.N. 450.
(3) ( ) 54 C.W.N. 110.

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A. N. Roy and S. K. Mukherjee for the Appellant.

R. C. Deb and Gouri Mitter for the Respondent.

The judgment of the Court was as follows :—

Chakravartti, C.J.:- The appellant, Sohonlal Nagarmull, who was the defendant in a suit decreed *ex parte,* had preferred the present appeal against an order or Mr. Justice P. B. Mukharji refusing to set aside the *ex parte* decree. The learned Judge did not deliver a judgment, but statements were made to us from the Bar regarding the ground on which he dismissed the appellant's application. The learned junior Counsel for both parties, who were in the Court below, stated that a preliminary ground was taken on behalf of the respondent that the application was barred by time and the learned Judge dismissed the application on that ground without entering into its merits.

Mr. Deb, who appeared before us as the leading Counsel for the respondent, stated that if limitation was the only ground on which the application had been dismissed, he would concede at once that the point should be decided in favour of the appellant. He added that we might proceed to consider the application on its merits or send it back to the learned Judge for disposal by him. It was, however, brought to our notice that there was a reported decision of Mr. Justice P. B. Mukharji himself, given in another case, according to which the application in the present case would be time-barred. We, therefore, thought that it would not be proper for us to decide the issue of limitation in the appellant's favour merely on the concession of Counsel without giving due consideration to the reasons given by the learned Judge in support of the view held by him. Such consideration appeared to us to be all the more necessary, because we were informed that, on the indentical point, there was also a decision by Mr. Justice Bachawat in which a contrary view had been taken, as there is obviously a conflict of opinion on a question of law and procedure affecting applications made on the Original Side of this Court, we thought it proper to give a decision on it.

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The facts are as follows. On the 21st November, 1950, the respondent, Manick Lal Seal, brought a suit against the appellant, Sohonlal Nagarmull, for recovery of possession of premises No. 85/2E, Ripon Street, arrears of rent and mesne profits. The suit appeared in the Peremptory List of Mr. Justice P. B. Mukharji on the 19th February, 1952, and was reached on the 28th March, 1952, when none being present on behalf of the appellant, it was decreed *ex parte*. Thereafter, the appellant took out a Master's summons for an application to set aside the decree and made an application which, however, was dismissed on the ground that it was not a proper application. Then on the 1st of April, 1952, the appellant took out a notice of motion in respect of an application to be moved on the 7th April following. On the 7th of April, 1952, the application appeared in the list of Mr. Justice P. B. Mukharji who gave the usual directions in regard to the filing of the affidavit-in-oppotion and the affidavit-in-reply and adjourned the motion to the 28th of April, 1952. On the 28th the motion was further adjourned to the next day at the instance of the respondent. On the next day, that is, on the 29th of April, the application was dismissed on the ground, as was admitted before us, of limitation. Thereupon, the present appeal was preferred.

The question before us is whether the dismissal was correct. Unfortunately, there are no materials to show what reasons actually weighed with the learned Judge, and to proceed on the footing that he must have dismissed the application on the identical reasons that he has given in the reported case will certainly be to proceed on an assumption. But no other reasons, and, in fact, no reasons at all were urged by the respondent in support of the order under appeal. We have, therefore, only to see whether the reasons given in the reported case for the view that an application would be barred by time in circumstances like those of the present case are good and valid and whether the order appealed from must, for those reasons, be upheld.

The earlier decision of Mr. Justice P. B. Mukharji is reported in *Debendra Nath Dutt* v. *Sm. Satyabala Dassi* (1). where it was a plaintiff's application for setting aside a decree dismissing the suit for default. The decree was passed on the

(1) (1949) 54 C.W.N. 110.

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5th of May, 1949, and a notice of motion returnable on the 22nd August, 1949, was taken out on the 19th of August. On the 22nd August, the usual directions for the filing of affidavits were given and the application was adjourned to the 6th September, but the petitioner did not get the application noted as made on that day. On the 6th September the application was adjourned to the 13th September and again the petitioner did not have the application noted as made even on that date. On the 13th September the application was adjourned till the 16th and on the 16th it was heard and dismissed as barred by limitation.

In giving his reasons, Mr. Justice P. B. Mukharji pointed out that under Article 163 of the Limitation Act, the relevant period of limitation was thirty days from the date of dismissal and, therefore, the application was plainly barred by time. even on the day on which the notice of motion had been taken out. It had however been argued before him that in a case where the plaintiff had no knowledge of the decree at the date it was passed, the starting point of limitation would be the date of the plaintiff's knowledge, which in that case was said to have been the 11th August, 1949. Mr. Justice P. B. Mukharji did not accept that view of Article 163, but he proceeds to hold that even assuming that the starting point of limitation was the 11th of August, 1949, the application was still out of time, because it was not "made" with the meaning of that word till the 16th September, 1949, when the period of thirty days had already expired. In the learned Judge's view, an application was not made when merely the notice of motion was taken out, nor made when only directions for the filing of affidavits were given or the hearing simply adjourned to a future date, unless, at least, the plaintiff got the application noted as made on one of such dates. When no such note was made on any of the earlier dates, the application was made only when it came to be heard. The learned Judge does not seem even to have decided that an application is made when it is noted as made without any hearing taking place, because all that he says is that if the application before him had been noted as made on the 22nd August or the 6th September, it might have been argued that limitation had ceased to run on the date when the note was made.

If the view taken by Mr. Justice P. B. Mukharji be correct, the application in the present case was not made till the 29th April, 1952, when it was heard. Previously thereto, only directions for the filing of affidavits had been given and orders for adjournment passed, but on none of those dates had the application been noted as made. The Article of the Limitation Act applicable to the present case is Article 164, which prescribes a period of thirty days from the date of the decree or where the summons was not duly served, the date when the applicant has knowledge of the decree. There is no case here of the summons not having been served or the appellant not knowing of the decree at the date it was passed. The appellant had therefore only thirty days from the 28th of March, 1952, and if his application was made only on the 29th of April, 1952, as it would have to be taken to have been according to the view of Mr. Justice P. B. Mukharji, it was clearly barred by time.

The decision of Mr. Justice P. B. Mukharji came to be considered by Mr. Justice Bachawat in the case of *Abdul Gani* v. *David Jacob* (1), where the learned Judge had to consider an application under section 5(2) of the Calcutta Thika Tenancy (Amendment) Ordinance, 1952. Such an application was required by the Ordinance to be made within three months from the date of its commencement which was the 21st October, 1952. The notice of motion was taken out on the 17th December, 1952, for the 22nd of December following and on the 22nd the usual directions for filing affidavits were given the application being adjourned to the 19th January, 1953. On the 19th it was further adjourned to the 27th January and the hearing of the application commenced on that date. It was argued on behalf of the respondent to the application that the application was not made within three months from the commencement of the Ordinance, that is, within the 21st of January, 1953. Mr. Justice Bachawat held that an application was made to a Court when the Court took cognisance of it and that in the case before him, it had been made, first, on the 22nd December, 1952, then on the 19th January, 1953, and, lastly, on the 27th January, 1953. He referred to the provisions of Rules 6 and 15 of Chapter 20 of the Rules of the Original Side and held that under the provisions of those Rules, orders giving directions for the filing of affidavits or ganting adjournments were judicial

(1) (1953) 57 C.W.N. 313.

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acts. He added that although an application was not made when a notice of motion was taken out, as held in certain earlier cases and finally in *Sree Chand Daga* v. *Sohanlal Daga* (1), there were expressions of opinion in those cases to the effect that an application was made when it was mentioned to the Court or when the Court took cognisance of it and, upon taking cognisance, passed an order for adjournment. The learned Judge did not consider himself bound by the observations made by Mr. Justice P. B. Mukharji on the second part of the case in *Debendra Nath Dutt* v. *Sm. Satyabala Dassi*, (2), because the application in that case being held to be barred even on the date when the notice of motion was taken out, the expression of opinion that it was not made on several subsequent dates and was made only when it was actually came to be heard was, strictly speaking, an *obiter dictum*.

Since we are considering the reasons given by Mr. Justice P. B. Mukharji on their merits, the question whether they were reasons necessary for the decision or mere further expressions of opinion in the nature of *obiter dicta*, is immaterial. What we have to consider is whether the reasons given by Mr. Justice P. B. Mukharji are correct.

There is no question that Article 164 of Schedule I to the Limitation Act applies to the case. That Article prescribes the time-limit for applications made by a defendant for an order to set aside a decree passed *ex parte*. With that Article must be read section 3 of the Act which provides that every suit instituted, appeal preferred and application made after the period prescribed therefor by Schedule I, shall be dismissed. There is an explanation as to when a suit is instituted, but the Section does not explain when an appeal is preferred or an application is made. It is, however, necessary to note that the Section speaks of making an application and not of filing or giving notice of one. The relevant enquiry must, therefore, be when an application is made.

Even apart from authority, it seems clear that to take out a notice of motion is not to make an application. A "notice of motion," as the term itself indicates, is only a notice that a motion will be made and not that it has been made or is being

(1) (1943) 47 C.W.N. 450.
(2) (1949) 54 C.W.N. 110.

made. It is only an intimation to the opposite party of an intention to make a motion on a future date which, under Rule 4 of Chapter 20 of the Rules of the Original Side, must be stated in the notice. But when after a notice of motion has been filed in the Registrar's office and pursuant thereto, the motion is included in the Peremptory List of the Judge on the day specified in the notice and the motion being called on, the petitioner makes some prayer on which the Court makes an order, the application, to my mind, is then made to the Court. Usually, the Court gives directions for filing the affidavit-in-opposition and the affidavit-in-reply and adjourns the application to a subsequent date, as was done in the present case on the 7th of April, 1952. Such an order is made under Rules 11 and 15 of Chapter 20 of the Rules of the Original Side. Unless such an order is made under Rule 11, giving leave to the parties to file the affidavit-in-opposition and the affidavit-in-reply on certain future dates, no such affidavits can be used at the hearing, if they were not filed before the date named in the notice of motion: see rules 7 and 11; and unless an order is made under rule 15, adjourning the hearing of a motion to a future date, it must be heard on the first date of hearing and cannot be heard on a subsequent date—see rule 15. The direction for filing affidavits on subsequent dates is made on the prayer of the parties and the order for adjournment is made with their consent. It would thus seem to be clear that when the Court is asked to adjourn the hearing of the application or to give leave to the parties to file affidavits on a subsequent date, the application is brought to the notice of the Court and the Court is moved in regard to it, so that the application is made. I would prefer not to use the phraseology adopted by Mr. Justice Bachawat and not to look at the matter from the point of view of the Court taking cognisance, because what we are considering is not when the Court entertains an application, but when the party makes his application to the Court. But I must hasten to add that cognisance taken by the Court is proof of the application having been made; for unless an application has been made, there is nothing before the Court of which it can take cognisance. It appears to me that when the Court makes an order for adjournment in regard to an application, it treats the application as already made and merely postpones its consideration: and, similarly, when it gives directions for the filing of

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affidavits, it makes an order on the application. By asking the Court to make such orders, the petitioner makes the application. There can be no question of getting the application noted as made on such dates, because the application is made in fact.

It does not appear to me to be material that when a motion is adjourned or directions are given for the filing of affidavits on future dates, the application is not heard on the merits. The law of limitation is addressed to the commencement of a proceeding and not to its disposal or to the consideration of the subject-matter. It is designed to discourage the pursuit of claims which have become stale by efflux of time and, naturally, the diligence it enjoins has reference to the intitiation of a proceeding. Section 3 of the Limitation Act to which I have already referred speaks of instituting a suit or preferring an appeal or making an application. The test, therefore, always is whether the party did all that he was required to do in order to bring the matter before the Court and set it in motion. If he did so, he instituted the suit or preferred the appeal or made the application, irrespective of whether any consideration of the merits of the case took place. It is true that the test of diligence would also be satisfied by the taking out of a notice of motion but that step is insufficient to constitute the making of an application, because it does not extend up to the Court. Where, however, the Court is approached in connection with an application, in whatever manner it may be, the application is made, unless it be that the approach is with regard to some incidental matter, belonging to a stage prior to the making of an application. Although therefore, this Court has not accepted the Bombay view that the filing of a notice of motion in the proper office of the Court for signature and seal is making an application for the purposes of limitation, or the Madras view that an application is made when the notice of motion is issued, it has never been held—nor is there any reason for holding—that an application is not made even when the motion comes up before the Court, the Judge gives direction for the filing of affidavits and adjourns the hearing to a subsequent date.

In my view, the application was made in the present case on the 7th April, 1952, which was the first day of the hearing of the motion and when the court gave directions for the filing

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of affidavits and adjourned the hearing to the 28th of April. As the decree was passed on the 28th of March, 1952, the application was within time.

There was some discussion at the Bar as to what further orders we should make in case we decided the issue of limitation in favour of the appellant. It was suggested on behalf of the respondent that we might proceed to hear the application on the merit, inasmuch as the affidavits were all on record and had been included in the paper book. We do not think that it will be proper for us to do so. The learned Judge had no occasion to consider the remaining issue or issues and it would not be proper for us, sitting as an Appellate Court, to decide those matters without the benefit of the findings of the learned trial Judge. The decree was a decree passed by him and it is that decree which is sought to be avoided on the ground that there was sufficient cause for the appellant's absence on the date the decree was passed. It appears to me that this is pre-eminently a matter, at least primarily, for the learned judge himself to consider and it is for him to say, in the first instance at least, whether the appellant has been able to make out a sufficient cause for his absence. The proper course for us to adopt therefore is to set aside the order of the learned Judge and to remand the case to him for a decision of the issues other than that of limitation which is the only matter we decide.

In the result, the appeal is allowed, the order of the learned Judge is set aside and the case is sent back to him for decision of the issues other than that of limitation, and disposal according to his findings.

Costs will abide the result. Certified for two Counsel.

S. R. Das Gupta, J.:—I agree.

S. M. Chatterjee: Solicitor for the Appellant.

T. Banerjee & Co.: Solicitors for the Respondent.

S.K.D.G. *Appeal allowed.*

APPELLATE CIVIL.

Before Mr. P. B. Charkravartti, Chief Justice and Mr. Justice S. C. Lahiri.

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August, 5.

INDRA NARAYAN BHATTACHARJEE

v.

PHANINDRA LAL SEN.*

Putni Regulations—Niskar right—Burden of proof—"Niskar Bhogdakhal sutre," the meaning of the entry in the Record of Rights.

In cases where the defendant claims a rent-free (Niskar) title the initial onus is on the plaintiff to prove that the land is a part of his mal assets and as soon as the plaintiff proves that fact, the burden of proof shifts on the defendant to show that they are entitled to hold the land without payment of rent.

A new putnidar is entitled to get the putni free from encumbrances created by the defaulting putnidar or putnidars and unless such encumbrances were created before the creation of the first putni.

The entry "Niskar Bhogdakhal sutre" in the Record of Rights at best means that the tenant is not actually paying rent to anybody and not that the tenant is not liable to pay rent to anybody, and as such this entry, by itself does not necessarily mean rent-free tenancy.

Appeal by the Tenant-Defendant.

Suit by the Plaintiff putnidar for assessment of rent. Plea of niskar title by the defendant.

The material facts will appear from the judgment.

Manindra Nath Ghosh and Anil Kumar Sen for the Appellant.

Satindra Nath Ray Chowdhury and Byomkesh Bose for the Respondent.

The judgment of the Court was as follows:—

* Letters Patent Appeals Nos. 13 to 23 of 1950, against the judgment Mr. Justice Thomas James Young Roxburgh, dated 21st of July 1950, in Appeals from Appellate decrees Nos. 2038 to 2046 of 1946).

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Indra Narayan Bhattacharjee v. Phanindra Lal Sen.

August, 5

S. C. Lahiri, J.:—These eleven appeals have been filed by the tenants defendants under clause 15 of the Letters Patent against a judgment of Mr. Justice Roxburgh whereby he has dismissed eleven second appeals preferred by them, questioning the correctness of decrees for assessment of rents made by the Courts below.

The plaintiff, Rai Bahadur Phanindra Lal Sen, purchased a putni taluk named Lot Simdali at an auction sale held under the Putni Regulation on November 17, 1932. This putni taluk is included in Touzi No. 1 of the Burdwan Collectorate, held by the Maharaja of Burdwan. It is undisputed that in 1210 B.S. the Maharaja created a putni in respect of the lands of Mauza Simdali and other properties in favour of one Jagat Narayan Roy in 1212 B.S. One Bhaktaram Roy executed another kabuliat in respect of lands of Mouza Simdali and other mouzas and in 1221 B.S. one Bhairab Singh executed a third putni Kabuliat in respect of the lands of Mouza Simdali only. In 1235 B.S. the putni was sold under the putni Regulation and purchased by one Badal Bibi and in 1300 B.S. the putni was again sold and purchased by one Bakkeswar, whose heirs were in possession on the date of the auction sale at which the plaintiff purchased. The plaintiff instituted the suits out of which these appeal arise for assessment of rent, alleging that the defendants were tenants under the putni purchased by him, that the lands held by the defendants were parts of the mal assets of Touzi No. 1 of the Burdwan Collectorate, that the defendants were liable to pay rent to the plaintiff, but they were refusing to do so relying upon certain incorrect entries in the Record of Rights which recorded their tenancies as niskar. The suits were contested by the defendants on the ground that the lands of their tenancies were not mal lands, that they had been holding the lands in *lakheraj* and *niskar* rights, that the entries in the Record of Rights were correct and that since the defendants were in possession of the lands without payment of rent, they were entitled to claim a rent free title on the presumption of lost grant. The defendants further pleaded that the suits brought by the plaintiffs were barred by limitation.

The plaintiff's suits were decreed by the learned Munsif and those decrees were affirmed on appeal by the Subordinate

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Judge and on second appeal by Mr. Justice Roxburgh. In six out of the eleven suits, the interest of the defendants has been recorded as niskar raiyati and in the remaining suits as niskar tenure-holders but in all the cases in the Remarks Column there is entry "Bhogdakhal sutre." The courts below have proceeded on the footing that in cases of this description the initial onus is upon the plaintiff to prove that the land is a part of his mal assets and was taken into account at the time of Decennial Settlement for the purpose of assessing revenue and as soon as that is done, the onus shifts on the defendants to prove that they are entitled to hold the land without payment of rent. It has been found in these cases that the plaintiff has succeeded in discharging the initial onus, but the defendants have failed to prove that they are entitled to hold without payment of rent. Mr. Justice Roxburgh has held that under section 11 of the Putni Regulation the plaintiff was entitled to get the putni free from encumbrances created by the defaulting putnidar or putnidars, and in order to succeed the defendants must prove either that there was a valid or an invalid revenue grant made in their favour prior to the permanent settlement or that the rent free title was created by the Maharaja of Burdwan before the creation of the first putni in 1210 B.S. According to Mr. Justice Roxburgh the entry in the Record of Rights at best proves that the defendants had niskar title under one of the putnidars which was not sufficient to defeat the plaintiff's claim. Against the decision of Mr. Justice Roxburgh the tenants defendants have filed these appeals.

Mr. Ghose appearing in support of the appeals has argued, in the first place, that Mr. Justice Roxburgh has misunderstood the effect of the entry in the Record of Rights. According to Mr. Ghose the effect of the entry is that the defendants must be taken to have proved that they were never liable to pay rent from the inception of the putni. The putni kabuliyats of 1210 B.S. 1212 B.S. and 1221 B.S. are on the record. The putni kabuliat of the year 1221 B.S. shows that the putnidar was making reservations in respect of a tank for which the zamindar had granted *sanad* and also in respect of rents which had been realised by the Zamindar up to the date of the execution of the putni kabuliat. The putnidar was further stipulating that he would not raise any objection with regard to the said grant or

realisation of rent. If rent free grants had been made by the zamindar before the creation of the putni as alleged by the appellants, it is reasonable to expect that the putnidar would have made similar reservations in respect of those grants but no such reservation is to be found in the putni kabuliat. From this fact the inference legitimately follows that rent free grants were not made by the zamindar before the creation of the putni.

Mr. Ghose next contended that the expression "niskar bhogdakhal sutre" in the Record of Rights means that the tenants had acquired rent free title by possession and enjoyment and there is a presumption of correctness of this entry which must prevail unless the contrary is proved by the plaintiff. This interpretation of the entry in the Record of Rights cannot be accepted as correct. In the case of *Kamala Ranjan Roy* v. *Ifran Sheikh* (1), to which Mr. Ghose himself drew our attention, Mitter and Akram JJ. observed as follows at page 16.

> "If a property is found to be in possession of a man who is not actually paying rent to anybody the property is to be described as niskar in the column in which rent is to be mentioned. If any documents, sanad, chhar etc. be produced the particulars of the document are to be stated there. But if no sanad, chhar or other documents of that nature be produced the remark is to be made that it is "Bhogdakhal Sutre."

This passage is based upon an interpretation of Rule No. 37 of the Technical Rules and Instructions of the Settlement Department which the Settlement authorities follow. It follows from the passage quoted above that the entry "Niskar Bhog dakhal Sutre" means that the tenant is not actually paying rent to anybody and not that the tenant is not liable to pay rent to anybody. The same view has also been taken by Sen and Chunder JJ. in the case of *Bibhuti Bhusan Kar and ors.* v. *Rai Phanindra Lal Sen Bahadur and ors.* (2), which has been referred to by Mr. Justice Roxburgh in his judgment. In this case the learned Judges held as follows:

> "A raiyati interest is assessable to rent and the word 'niskar' does not take away from this liability. It only

(1) [1918] A.I.R. Cal. 14.

(2) S. A. Nos. 1918-1930 of 1914.

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shows that this raiyati interest had been enjoyed by the tenants without paying rent, but it does not show that the lands are not assessable to rent."

We see no reason to differ from the observations made in the two Bench decisions quoted above and, accordingly, we must hold that the word "niskar" when it appears in the Record of Rights, by itself does not necessarily mean rent free tenancy, but only means that the tenant is not in fact paying rent to anybody. Mr. Ghose relied upon the decision in the case of *Sri Monohar Das Mahanta* v. *Charu Chandra Pal* (1), for the proposition that in that case a different view was taken of the expression "Bhogdakhal Sutre." On going through that judgment, we find nothing which is contrary to the interpretation of that expression as accepted by us.

The next point urged by Mr. Ghose is that, in cases of the present description the onus is upon the plaintiff to prove that the rent free grants came into existence after the creation of the putni, the presumption being that they "run back to a period antecedent to the creation of the putni." In support of this proposition reliance was placed upon the case of *Bipradas Pal Chowdhury* v. *Kamini Kumari Lahiri* (2). On going through the facts of that case, it appears to us that it is of no assistance to the appellants. That was a case where the plaintiff purchased a putni taluk at a sale held in execution of rent decree and after serving notices under section 167 of the Bengal Tenancy Act for annulment of encumbrances, sued for eviction of the defendants as trespassers. The defence *inter alia* was that no zamindar or putnidar was ever in possession within twelve years and as such the plaintiffs claim was barred by limitation. The plaintiff, however, relied upon Article 121 of the Limitation Act. The High Court in its judgment pointed out that if the plaintiff relies upon Article 121 he has to establish that "the incumbrance which he seeks to annul commenced after the creation of the Putni. * * * On the other hand, there is ample evidence that the adverse possession of the defendants and their predecessors commenced before the creation of the putni. There are traces on the record to show that there had been assertions of hostile title before the putni itself was created." In these circumstances the Privy Council affirmed the decision

(1) (1950) 54 C.W.N. 706. (2) (1921) 26 C.W.N. 465

of the High Court upon the view that the proper presumption was that the adverse possession of the defendants ran back to a period antecedent to the creation of the putni. In the cases before us there is nothing to show that the tenants and their predecessors had ever asserted a rent free title before the creation of the putni. On the contrary, the putni kabuliyat of 1221 B.S., to which I have already referred, shows that no reservation was made in respect of any rent free grant by the Zamindar. We must, therefore hold that the principle laid down by the Privy Council in *Bipradas Pal Chowdhury's case* (1), has no application to the circumstances of the present case. The principle of onus applicable to cases of this description has been settled by a long line of judicial decisions beginning from *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo* (2). *Jagdeo Narain Singh v. Baldeo Singh* (3), and ending with *Kamala Ranjan Roy* v. *Ifian Sheikh* (4). In all these cases it has been uniformly laid down that the intial onus is upon the plaintiff to prove that the lands formed part of his mal assets and as soon as the plaintiff proves that fact, the burden of proof shifts on the defendants to show that they are entitled to hold the land without payment of rent. It is interesting to note that even in *Bipradas Pal Chowdhury's case* (1), the Privy Council expressly follows the principle in respect of onus laid down in *Hurryhur Mookhopadhya's case* (2). Mr. Ghose made a faint attempt in his opening to contest the finding that the lands are included in the mal assets of the plaintiff, but he finally abandoned the point. We must accordingly hold that the plaintiff has discharged the initial burden that lay upon him to prove that the lands are included in his mal assets, but the defendants have failed to prove that they are entitled to hold without payment of rent.

In his opening Mr. Ghose raised a point that the suits are barred under Article 131 of the Second Schedule of the Indian Limitation Act which provides that in suits to establish a periodically recurring right, the limitation is twelve years from the time when the plaintiff is first refused the enjoyment of the right. In these cases it has been found by the Courts below

(1) (1921) 26 C.W.N. 465.
(2) (1871) 14 Moore's I.A. 152 at page 173.
(3) (1922) L.R. 49 I.A. 399.
(4) [1948] A.I.R. Cal. 14.

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that the plaintiff purchased the putni on November 17, 1932, and made demands for rent from different defendants on different dates—the last demand being made in Kartick, 1349 B.S. November, 1942. The suits were instituted on July 17, 1943, well within twelve years from the date of the plaintiff's purchase. In view of these findings, Mr. Ghose did not develop this point in the course of his argument and finally said that he abandoned the point about limitation. In these circumstances, this plea must be overruled.

As all the points urged on behalf of the appellants fail, these appeals must be dismissed with costs—the hearing-fee being assessed at one gold mohur in each case.

P. B. Chakravartti, C.J.:—I agree.

S.C.P. *Appeal dismissed with costs.*

APPELLATE CIVIL.

Before Mr. Justice R. P. Mookerjee and Mr. Justice P. N. Mookerjee.

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1953.

September, 10.

MOHAMMAD NASSAIR
v.
MOHAMMAD YUSUF & ORS.*

Mahammedan Law—Wakf—Essential conditions of a valid Wakf—"Religious pious, or charitable" objects under clause 2(1) of the Wakf Act—Postponement of vesting in charity, permissible limit.

One of the essential conditions of a valid Wakf is that the appropriation must be at once a complete one. When the objects of the Wakf are certain and definite it will not make the Wakf an invalid one because no definite portion of the property or specific amount or portion of the income is dedicated to religious or charitable purposes of a permanent character.

* Appeal from Original Decree No. 71 of 1948, against the decree of N. Banerjee Esq., Additional Sub-Judge, 3rd Court of Zillah 24-Parganas at Alipur in Title Suit No. 6 of 1947 dated 17th of January, 1948.

If the vesting in charity is to be postponed not only after the descendants of the Wakf and the members of his family but also of distant kindred the ultimate gift to charity must be held to be more remote than is allowed under Section 14 of the Musalman Wakf Validating Act. But where the postponement is till after the descendants on the male line and then also after the daughters line, the objection that the vesting in charity is more remote than is allowed under law must be overruled.

Appeal by the Plaintiff.

Suit for Partition.

The material facts will appear from the judgment.

Hemendra Chandra Sen and Saroj Kumar Maity for the Appellant.

Khagendra Nath Bose for Respondent No. 2.

M. A. Haque and M. S. Rahaman for other Respondents.

The judgment of the Court was as follows:—

R. P. Mookerjee, J.:—The plaintiff appellant had filed a suit out of which the present appeal arises for partition of certain items of property on the allegation that they were held jointly with the defendants. Objection was raised on behalf of some of the defendants in respect of some of the properties alleging that such properties were not divisible ones. The suit has been decreed in part.

In the present appeal the plaintiff appellant had originally raised only one question.

The property described as item 7 is premises Nos. 20, 20/1 and 21, Beliaghatta Main Road. The plaintiff claimed that this was a joint property. The defendants case, on the other hand, was that this property was made *Wakf* under a registered deed of Wakf-Aulad executed on the 14th April, 1920, which has been marked as Exhibit A in the case. The learned Subordinate Judge accepted the case as made out by the defendants and dismissed the plaintiff's claim in respect of this property.

Mr. Sen appearing on behalf of the appellant contends that the *Wakf-Aulad* affected merely a two anna interest in the property in question and not the entire interest in the said property. The decision on this question, will depend on an interpretation of the relevant provisions in the Wakf-al-Aulad.

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Later on however Mr. Sen appearing on behalf of the appellant asked for leave to urge another point as to whether this Wakf was a legal and valid one. We have heard the parties on this point also and proceed to consider both the questions.

Mr. Sen contends that so far as the properties described in Schedule Kha to the plaint are concerned there is no ultimate gift to charity.

In paragraph 4 of the Wakf it is provided—

> "The property described in Schedule 'Kha' below is let out to non-permanent Bharatiya tenants-at-will. The expenses on account of the taxes and rents etc. of the entire Wakf property and the expenses for the preservation and up-keep of the entire Wakf property and for the pairs of the structures etc. standing on the Wakf property shall be met from the income of the said property."

In the first place it is for consideration whether this provision may be considered as one for gift to charity. Or in other words is a property given for the upkeep of Wakf property can be considered to have been made a Wakf?

The question whether a property has been dedicated to religious or charitable uses must be determined with reference to the religious sentiments of the community to which the properties belong and not in accordance with the ideas or sentiments prevalent amongst a different community.

While dealing with "Musarif"—that is the disbursement of income from Wakf properties or the proper object of appropriation—Baillie in his Digest of Mahomedan Law (P. 574) observes—

> "The income of a Wakf is to be expended in the first place on necessary repairs, whether the appropriator has made it a condition or not * * * but if anything else has been specified the income must be applied to that immediately after the repairs."

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A distinction however is made between a property which is being used for religious or charitable purposes and one which is appropriated for the residence of some person or other.

"If one should appropriate his mansion for the residence of his child the repairs are to be made by the person who has the right of residence; and if he refuses or is poor, the Hakim or Judge, has to let the mansion, and to make the repairs out of the rent; and when these had been completed, he should restore it to the person entitled to reside in it. But that person cannot be compelled to make the repairs nor has he had liberty to let the mansion."

If however a person directs that the income is given to an individual for his personal use for a certain period and after that to the poor and makes it a condition that the repairs are to be made out of the properties for repairs are to be postponed to the right of the person unless the postponement of them should be for the manifest injury of the Wakf in which case the repairs must first be made.

In conformity with the principles abovementioned repairs to Imambarahs *Bibijan* v. *Kalb Husain* (1), up-keep of Private Guest House *Yusuf Khan* v. *Misal Khan* (2), and maintenance of the tomb of a saint, *Advocate General of Bombay* v. *Yusuf Ali* (3), have been held to be valid objects of a Wakf. Such a purpose will be considered to be "religious, pious or charitable" under Clause 2(1) of the *Wakf Act* also.

There is no dispute between the parties that the properties included in Schedule "Ka" are admittedly Wakf properties. But the members of the family are allowed to reside in the dwelling house during their lifetime and also their descendants. The repairs to such property therefore whilst the houses are in the occupation of individuals cannot be considered to be a valid object of Wakf. This aspect of the question had not been specifically raised or considered in the lower Court and it is not possible to give a final decision with regard to each one of the property which is included in schedule "Ka" and admittedly

(1) (1908) I.L.R. 31 All 136. (2) 73 I.C. 99.
(3) (1922) 24 B.L.R. 1060.

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made a Wakf. On the materials before us therefore we cannot hold that, in the special circumstances of this case particularly in the absence of necessary materials the provisions for the repairs of properties included in Schedule "Ka" out of the income of the properties included in schedule "Kha" would by that fact alone make the properties included in later schedule Wakf properties.

The learned Subordinate Judge has however held in respect of the properties included in Schedule "Kha" that there is an ultimate dedication to religious and charitable purposes and we shall proceed to consider whether the objections raised on behalf of the appellant is well founded.

One of the essential conditions of a valid Wakf is that the appropriation must be at once a complete one. When the objects of the Wakf are certain and definite it will not make the Wakf an invalid one because no definite portion of the property or specific amount or proportion of the income is dedicated to religious or charitable purposes of a permanent character. *Ghazafar Husain* v. *Ahmadi Bibi* (1), *Muhammed Kazim* v. *Abi Saghir* (2).

It is however contended on behalf of the appellent that the dedication in the present case in favour of charity is too remote and the ultimaate gift is an illusory one. There is no out and out appropriation at the time of the Wakf and by the introduction of the daughters' lines as being entitled to the property under certain contingencies there is an uncertainty which invalidates the Wakf.

Although there was at one stage some doubt and difference of opinion on this question it has now been settled and so far as this Court is concerned the Bench decision in *Syed Mohiuddin Ahmed* v. *Sofia Khatun* (3). has clarified the position.

If the vesting in charity is to be postponed not only after the descendants of the Wakf and the members of his family but also of distant kindred the ultimate gift to charity must be held

(1) (1929) 52 All. 868.

(2) (1931) I L.R. 11 Pat. 288. (3). (1940) 44 C.W.N. 974.

to be more remote than was allowed under section 4 of the Musalman Wakf Validating Act. The provisions of the Wakf-al-Aulad, which were the subject matter of scrutiny in *Syed Mohiuddin Ahmed's case* (1), provided for the postponment to charity till after the failure of the heirs, how low so ever, of the members of the Wakif's family. This was held to be so distant and so improbable of an achievement that it was held that there was no valid gift to charity.

In the present case, the postponement is till after the descendants on the male line and then also after the daughter's lines. These provisions do not, however, exhaust all the heirs under the Mahomedan Law. The connotation of the term 'family' as under the Mahomedan Law has been discussed in *Ghaznafar* v. *Ahmedi Bibi* (2). The members in the daughters lines are members of the family.

The objection that the vesting in charity in the present Wakf was more remote than was allowed under the law must therefore be overruled.

We now proceed to consider as to what share in the property was made the subject matter of the Wakf. In the opening paragraph of the Wakf-al-Aulad it is specifically stated that whatever right, title and interest the four executants had in the properties in question "become vested in the Great God this day." In paragraph 5 of the Wakf-al-Aulad are detailed the devolution of the interest as also how the income of the property is to be utilised until the income is spent for the maintenance of the poor and the distressed Musalmans of the locality.

The properties in question are partly portions of the land covered by buildings which were being used for residence by the parties or being let out. This portion is included in schedue "Ka" in the Wakf-al-Aulad. There was a certain portion of the premises which had been lying vacant. The portion of the property which was let out to non-payment *bustee* dwellers as tenants at will were included in schedule "Kha"

In paragraph 5 of the Wakf-al-Aulad it is provided that the income that would be derived either from the structures or

(1) (1940) 44 C.W.N. 974. (2) (1929) I.L.R. 52 All. 368.

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from the lands which are let out or may in future be derived from the patit land will be taken by all the four executants during their life time subject to the condition appearing in paragraph 4 of the Wakf-al Aulad under which the income from the property included in Schedule "Kha" of the Wakf-al-Aulad would be utilised on account of the taxes and rents *et cetra* of the entire Wakf property and the expenses for the preservation and up-keep of the entire Wakf property and for the repairs of the structures.

The provision made as to what would happen on the demise of Karimannesha Bibi is in the following terms:

> "On the demise of me Srimati Karimannesha Bibi my share of the aforesaid income will be received by my three sons . . . . . in equal shares for their maintenance during their life time, (that is to say) upon the demise of me, Srimati Karimannesha Bibi, the 16 annas share of the said income will be divided into three equal shares, out of which" one third share will be received by each of the three sons and his male descendants for their maintenance.

Karimannesha Bibi had a two annas share in the suit properties. It is contended on behalf of the appellant that the provision above mentioned refers only to her share in the properties and does not provide for the devolution of the interest to receive the income from the remaining fourteen annas share after the death of the three sons.

It may be that the involved language used in paragraph 5 may at first sight support the contention raised on behalf of the appellant, but if the entire paragraph be read as one composite whole there is no doubt as to what was the intention of the parties and what had actually been done. The scheme which was adopted by the parties was that the interests of all the four persons were being made Wakf, and during their life time they would be entitled to appropriate for their own use the income from the said estate. After the death of Karimannesha the income which would be taken by her would not be available to all of her heirs, but to her three sons. It is for this purpose

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that a specific mention is made in paragraph 5 of the Wakf-al-Aulad as to what is to be of the estate after Karimannesha's death. Such income being made available to the three sons of Karimannesha, and the income of the entire estate, viz., the fourteen annas share which had originally belonged to the three brothers and the two annas share which had originally belonged to Karimannesha would be available to the three sons along with their male descendants and others. The provision which is made thereafter makes a reference to the income of the entire property and not to the two annas share of the property which had at the time of the execution of the Wakf-al-Aulad belonged to Karimannesha.

If we refer to the opening paragraph of the Wakf-al-Aulad as also the description of the properties with the heading as regards the entire property in respect of which the Wakf is made along with the directions given in paragraph 5 of the Wakf-al-Aulad there can be no doubt that the Wakf included the entire sixteen annas interest in the properties which had originally belonged to Karimannesha and her three sons. We must, therefore, hold that the entire properties which are described as item No. 7 in the schedule to the plaint of the present suit were included within the Wakf-al-Aulad executed by Karimannesha and her three sons on the 14th April, 1920.

In this view the decision of the learned Subordinate Judge that those properties could not be the subject matter of partition as amongst the heirs of the executants of the said Wakf-al-Aulad was a correct decision. This appeal must accordingly be dismissed. In view of the fact that the question depends upon the interpretation of the Wakf-al-Aulad which was not in very clear and unambiguous terms parties will bear their respective costs in this Court.

P. N. Mookerjee, J.:—I agree.

S.G.P. *Appeal dismissed.*

INCOME TAX REFERENCE.

Before Mr. Justice G. N. Das and Mr. Justice S. K. Sen.

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1953.

January, 15.

JOTIRIINDRA NARAIN SINHA CHOWDHURY

v.

COMMISSIONER OF AGRICULTURAL INCOME-TAX, ASSAM.*

Agricultural Income-Tax—Selami *received by landlord for settlement of lands for agricultural purpose—Whether such selami is exempt from Agricultural Income-Tax*—Selami, *whether a capital receipt or an income—Assam Agricultural Income-Tax Act, Section 2(a).*

The question whether a particular receipt like *selami* can be regarded as income or as capital receipt cannot be answered in the abstract, each case has to be decided on its special facts.

Where a *selami* is received by the landlord for permission to the lessee to enter the land for enjoying the benefits of the settlement, this receipt must be regarded as capital receipts and not income within the meaning of the Assam Agricultural Income-tax Act.

Reference by the Board of Agricultural Income-Tax, Assam.

Objections by the Assessee.

The material facts will appear from the judgment.

Rajendra Bhusan Bakshi and Amal Kumar Mukherjee for the Assessee Petitioner.

S. C. Mitter for the Respondent.

The judgment of the Court was as follows:—

C. N. Das, J.:—This is a Reference by the Board of Agricultural Income-Tax, Assam, under section 28(2) of the Assam Agricultural Income-Tax Act of 1939.

* Income Tax Reference No. 12 of 1942.

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This case has a chequered history, and has been to several Courts and Tribunals.

This assessee is Sri Jyotirindra Narayan Sinha Choudhury, a co-sharer in a Zemindary known as Parbatjora Estate. The share of the assessee is 8 annas 9 pies. In September, 1941, the assessee filed a return of his agricultural income. In column 6(ii) of Schedule A to his return which is headed as *selamis or premia* received by the landlords for settlement of waste lands or abandoned holdings for agricultural purposes, etc. an item of Rs. 2,025-3-11¼ pies was shown. In a letter accompanying the return the assessee stated that the amount collected as *selamis or premia* for waste lands and abandoned holdings, namely, Rs. 9,331-9-4 p. has not been shown as this was not subject to assessment of agricultural income-tax.

The Agricultural Income-Tax Officer, however, made an order of assessment including a sum of Rs. 9,332 less collection charges at the rate of 15 per cent. amounting to Rs. 1,398—Rs. 7,934 as agricultural income. The order of assessment was made on the 10th of November, 1941. Against this order the assessee took an appeal to the Appellate Assistant Commissioner for Agricultural Income-Tax, Assam. The Appeal was dismissed on the 13th May, 1942. Against this order the assessee made an application for review under section 27 of the Assam Agricultural Income-Tax Act before the Commissioner. The assessee also filed a reference petition before the Board of Agricultural Income-Tax, Assam. The review petition was dismissed by the Commissioner and on the application for reference the Board made an order referring two questions of law to this Court for its opinion.

The questions are:

1. Whether *selami* received for settlement of agricultural holdings where the rate of annual rent reserved for such holdings is uniform and where the *selami* is taken once in the period of the occupation by a particular tenant but where the period of occupation is not ascertainable as no written leases are given, is agricultural income within the meaning of section 2(a) (1) of the said Assam Agricultural Income-Tax Act?

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2. Whether in view of the facts and circumstances of the case the sum of Rs. 7.904 received by the assessee as *selami* for settlement of agricultural holdings is agricultural income within the meaning of section 2(a) (1) of the said Assam Agricultural Income-Tax Act?

The Reference was heard by a Bench of this Court and by a judgment, dated the 12th of April, 1945, this Court answered question No. 2 in the affirmative. In the course of its judgment this Court observed that *selami* for the grant of lettings of waste lands or re-setting of abandoned holdings is agricultural income. Against this decision an appeal was taken to the Privy Council. Later on, by virtue of the passing of the Federal Court Extension of Jurisdiction Act the appeal was registered as Civil Appeal No. 30 of 1948. The Appeal was heard by the Federal Court and by its judgment, dated the 16th of May, 1949, the Federal Court directed that the order of this Court be set aside and the case sent back to the High Court to be dealt with after ascertaining and considering the following factors which were likely to show the true nature of the receipts described as *selami* in the present case.

1. Number of settlements of waste lands or abandoned holdings during the accounting year and the maximum and the minimum extents settled and *selami* received.

2. Does the *selami* vary with the quality of the land, the facilities for irrigation and such other favourable factors?

3. How many tenants were ejected under section 69 during the accounting year and how long they had been in occupation before such eviction?

4. Is *selami* received when lands are relet after eviction?

5. Is *selami* that is paid in the zemindary of the assessee in the nature of the "present" given by the tenant to the landlord for his permission to occupy the land, or whether it is in substance a premium payable by lessee at the inception of the tenancy?

On receipt of the order of the Federal Court the Assam Board has answered the above questions in the following way:

1. Total number of settlements—414. Amount of *selami* Rs. 9,332. There is a note appending settlement of virgin and estate purchased lands.

2. Maximum extent—59 bighas, 2 cottahs and 10 dhurs. *Selami* Rs. 161-8-6½ ps. Minimum extent 15 cottahs. *Selami* Rs. 2-11-9 pies.

3. Rate of *Selami* varies with the quality of lands. There are generally two fixed rates of *selami*, namely, Rs. 7, per bigha for jungle lands and Rs. 10 per bigha for lands which are not jungle.

4. No tenant was ejected under section 69 of the Goalpara Tenancy Act, action was taken under section 68.

5. Lands were sold in execution of rent decrees and purchased by the landlord and then settled on receipt of *selami*.

6. *Selami* was not present. There is a compulsory payment at inception of the letting.

The question is whether on the facts found by the Board, the *selami* that was received in the present case by the assessee could be regarded as agricultural income or not. The term "agricultural income" is defined in section 2(a) of the Assam Agricultural Income Tax Act. The relevant portion runs as follows: "Unless there is anything repugnant in the subject or context agricultural income means (1) Any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in Assam or subject to a local rate assessed and collected by officers of Government.

(2) . . . . (This is not relevant for the present purpose)."

In order to determine whether the *selami* received in the present case is agricultural income within section 2(a) we have

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thus to consider the following elements, namely, (1) whether the receipts can be regarded as rent or revenue, (2) whether the rent or revenue was derived from land (3) whether the land was used for agricultural purposes and (4) whether the land was assessed to land revenue or local rates. In the present case it is not disputed that conditions Nos. 2 and 4 have been satisfied, namely, that the alleged receipt was derived from land which was assessed to land revenue or local rates. The question which has been agitated before us concerns the 1st and the 3rd conditions referred to above, namely, whether the amount received is rent or revenue and secondly whether it was derived from land used for agricultural purposes. Taking the 1st condition, namely, whether the receipt was rent or revenue, the taxing authorities and this Court before remand were of the opinion that the receipt was revenue. It was not the case of the taxing authorities that it was rent. I shall first deal with this question, namely, whether the receipt in question can be regarded as revenue. In the case of *Province of Bihar* v. *Maharaja Protap Udai Nath Sahi Deo* (1), a Special Bench of the Patna High Court was of the opinion that the word "revenue" means a payment in the nature of income other than rent derived from agricultural land. The question therefore is whether the receipt with which we are now concerned can be regarded as income.

The Indian Income Tax Act merely describes the various sources of income and prescribes methods of computing the same but it discreetly refrains from saying what constitutes income. The word "income" is undoubtedly a term of elusive import and it is not capable of a precise definition which will adequately meet legislative requirements. The Court has to form an opinion of its own in the facts of each particular case bearing in mind dictionary meaning of the word and the principles which have been enunciated in judicial decisions.

In the case of the *Commissioner of Income Tax, Bengal* v. *Shaw Wallace & Co.* (2). Sir George Lowndes attempted a definition of the term "income." The relevant observations are as follows:

(1) (1941) I.L R 20 Pat 699
(2) (1932) L R 59 I.A. 206.

"Income their Lordships think, in this Act" (Indian Income-tax Act) "connotes a periodical monetary return 'coming in' with some sort of regularity or expected regularity from definite sources." The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return excluding anything in the nature of a mere windfall.

The opinion expressed by the Board in the case above cited was quoted with approval in a later decision of the Board in the case of *Gopal Saran Narain Singh* v. *Commissioner of Income-Tax, Bihar and Orissa* (1). Lord Russell of Killowen stating the opinion of the Board however made an important reservation, the reservation being that the word "income" is not limited by the words "profits" and "grants." Anything which can properly be described as income is taxable under the Act unless expressly excluded. The Judicial Committee again considered the meaning of the term "income" in the case of *Kamakshya Narain Singh, of Ramgarh* v. *Commissioner of Income-Tax, Bihar and Orissa* (2). In that case the question before the Board was whether *selami* paid by a lessee of mineral rights for a term of 999 years as also the minimum royalty payable under the lease or the royalty per ton provided for in the lease. could be regarded as income and assessable as such. In the course of the judgment Lord Wright observed at page 190—"the *selami* has been rightly treated as a capital receipt. It is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted to them by the lessors. That general right may properly be regarded as a capital asset and the money paid to purchase it may properly be held to be a payment on capital account." It was also pointed out at page 194 that "income is not necessarily the recurrent return from a definite source though it is generally of that character. Income again may consist of separate receipts as it generally does in case of professional earnings." The above discussion clearly indicates that the fundamental idea of an income being the result of a continuous exercise of an activity as laid down by Sir George Lowndes in *Shaw Wallace's Case* (3), has been whittled down to a certain extent by the later pronouncement of the Board. The

(1) (1935) L.R. 62 I.A. 207. (2) (1943) L.R. 70 I.A. 180.
(3) (1932) L.R. 59 I.A. 206.

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element of periodicity which is emphasised by Sir George Lowndes has been explained in a later decision in the case of *Staney* v. *The Rev. E. S. Starkek* (1), to which our attention was drawn by Mr. Mitter appearing for the Board. The observations of Rowlat, J. at Page 154 may be quoted.

"When one speaks of the element of periodicity, I think what is intended is to refer to a thing which has reference to the recurrence of the periods, even though the periods may only come round once, or may only have come round once so far."

In that case the question was whether the offerings received by the respondent at Whitsuntide were assessable as such. The Court held that it was assessable. At the same time it must be observed that these offerings were received or were expected to recur at Whitsuntide. The question was whether it was a capital receipt or not. In my opinion the question whether a particular receipt like *selami* can be regarded as income or as capital receipt cannot be answered in the abstract. Each case has to be decided on its special facts. It was for this reason that the Federal Court directed a remand to this Court for the purpose of enabling this Court to find out the precise nature of the *Selami* in the present case, after obtaining from the Board the answers to the five factors which were mentioned in the judgment.

The facts which have now been found by the Board may be summarised as follows:—

The assessee is a co-sharer in the Parbatjora Estate having 8 annas 9 pies share therein. The Tenancy Act in the area is the Goalpara Tenancy Act I of 1929. Under the Act the ejectment sections are spread over sections 65 to 69. Section 65 makes a general provision that a tenant can be ejected in execution of a decree. Section 66 speaks of ejectment of permanent tenant on the ground of a breach of a covenant. Section 66 speaks of ejectment of occupancy *raiyats*. This is permissible only in two cases namely cases of improper use or cases of breach of a condition consistent with the Act. Section 68 lays down that a permanent tenure-holder or a *raiyat* at fixed rates or an

(1) (1831) 2 K B. 148.

occupancy *raiyat* cannot be ejected for non-payment of arrears of rent. Section 69 speaks of ejectment of non-occupancy *raiyats* on the ground of non-payment of arrears of rent. Section 69 speaks of ejectment of non-occupancy *raiyats* on the ground of non-payment of arrears of rent or improper use or service of a six months notice.

A perusal of these sections indicates that the tenants of the above descriptions cannot be turned out at the mere whim of the landlord. In all cases the landlord has got to obtain a decree for ejectment. The protection is greater in case of occupancy *raiyats* where the ejectment can only be allowed in two classes of cases mentioned above. A non-occupancy tenant may be ejected no doubt for non-payment of rent or by the service of a notice for 6 months. In the present case it has been found that the settlements in regard to which *selami* was received by the landlord were settlement of virgin lands or of lands purchased by the landlord in execution of a decree for rent. The total number of settlements of virgin land has been found to be 278 and that of estate purchased land 136. There has been no instance of resettlement after eviction by service of 6 months notice to quit. There has been no written lease but the rent is more or less fixed at 11 annas per bigha plus local rates. The amount of *selami* received varies with the quality of the land, the amount generally realised being Rs. 7/- per bigha for jungle lands and Rs. 10/- per bigha for other lands. The maximum area settled is 59 bighas, *selami* received being Rs. 161 and odd annas, the minimum quantity of land settled being 15 cottahs. It has not been suggested that the *selami* that was realised represents advance rent nor has it been suggested the *selami* realised in case of estate purchased lands includes the rents which were unrealised during the period the landlord was in *Khas* possession.

In these circumstances the question is whether the *selami* sought to be assessed can be regarded as income or whether it is a capital receipt. It is undoubtedly a single payment made at the inception of the settlement. The landlord receives the *selami* in addition to the rent which is to be paid from time to time. The period of occupation of the tenant is uncertain. It is not a present made to the landlord at the inception of the

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tenancy as has been observed by the Board. For the same land there is hardly any chance of re-settlement to the tenant, the receipts being receipts of *selami* in case of settlement of virgin lands or estate-purchased lands occasioned by default of the tenant in paying arrears of rent. In these circumstances, in my opinion, a fair conclusion to draw is that the *selami* is received by the landlord for permission to the lessee to enter the land for enjoying the benefits of the settlement. In this view the receipts that have been sought to be assessed in the present case must be regarded as capital receipts and not income within the meaning of the Assam Agricultural Income Tax Act.

The view taken above receives support from two decisions of the Patna High Court, namely, the case of *The Commissioner of the Income-Tax* v. *Visheswar Singh* (1) and *The Province of Bihar* v. *Maharaja Protap Udai Nath Sah Deo* (2). It is true that in these cases the *selami* that was received concerned one item of property, but this fact is not material for the present discussion. In my opinion, the true character of the receipt in the present case does not materially differ from the receipts in those cases.

It remains for me to consider a decision of this Court in the case of *Birendra Kishore Manikya* v. *Secretary of State for India* (3). A perusal of that judgment indicates that the parties conceded that the receipts sought to be assessed was income. The only question before this Court was whether this was agricultural income within the meaning of the Income-Tax Act. A Bench of this Court was of the opinion that the income received as *selami* was either rent or revenue. In my opinion, this decision stands on its special facts and is not conclusive of the matter. The decision was dissented from by the Patna High Court and its authority has been shaken by the decisions of the Privy Council referred to also.

The answer to question No. 2 must therefore be that the sum of Rs. 7,994 received by the assessee as *selami* for settlement of agricultural holdings is not agricultural income within the meaning of the Assam Agricultural Income-Tax Act.

(1) (1939) I.L.R. 18 Pat 805. (2) (1941) L.R 20 Pat. 639.
(3) (1920) I.L.R. 48 Cal 766.

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In the above view it is not necessary to express our opinion on a point which cropped up towards the close of the argument, namely, whether the *selami* that was received in the present case was derived from agricultural land. It may be pointed out that in the case of *In re: Sir Bejoy Chand Mahatab Bahadur* (1), it has been held that the land in respect of which income is derived must be actually used for agricultural purposes in the accounting year. The purpose for which the lease was originally given or the purpose for which the land was being used at the inception of the tenancy before the year of assessment is immaterial. In the present case as this point was not discussed at an earlier stage of this case the relevant enquiry was not made but it seems to me that there is much force in the contention that the land from which income was derived in the present case was not used for agricultural purposes and condition No. 3 was not fulfilled.

In the result the assessee is not liable to be assessed to agricultural income tax for the sum of Rs. 7,994 which was sought to be assessed in regard to the *selami* received by the assessee in the present case. As the assessee has succeeded the Board must pay the costs of this hearing as also of the hearing before the Federal Court. Certified for two Counsels as of a defended suit.

S. K. Sen, J.:—I agree.

S.G.P. *Reference answered in the negative.*

(1) (1940) 8 I.T.R. 878.

APPELLATE CIVIL.

Before Mr. Justice S. C. Lahiri and Mr. Justice J. P. Mitter.

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January, 27

KSHIRODE NARAIN BHUNIA

v.

TAMIRUDDIN SHAIKH & ORS.*

Bengal Tenancy Act—Section 104J, scope of—Settlement Roll, whether conclusive for the purpose of rights of recorded tenant—Suit for possession under proviso to Section 111A of B. T. A.—Dispossession of tenant by

* Appeal from Appellate Decrees Nos. 264 and 265 of 1948, against the decree of R. M. Chatterjee, Esq., Additional District Judge of Zillah 24 Parganas at Alipore, in Title Appeal No. 273 of 1946 dated the 11th of October, 1947, modifying the decree of J. C. Majumdar, Esq., Subordinate Judge, Third Court, Alipore, date the 30th of April 1946.

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Kshirode Narain Bhunia
v.
Tamiruddin Shaikh & Ors.

January, 27.

Landlord—Dispossession of the tenant by the lessee of the Landlord equivalent to dispossession by the Landlord—Special Rule of Limitation under Schedule III, Art. 3, of the B. T. A.—Abandonment of occupation, proof of.

Under Section 104A to 104K of the Bengal Tenancy Act, the revenue officers have jurisdiction not only to determine the amount of rent in an ideal sense, but also to determine the question of liability. Between the recorded landlord and a recorded tenant if a dispute arises on the question whether the tenant is liable to payment at the contractual rate or at the rate entered in the record of rights prepared under Part II of Chapter X of the Bengal Tenancy Act, the tenant is bound to pay rate at the rate entered in the record of rights in the absence of a suit under Section 104H of the Bengal Tenancy Act. But a stranger is not a person who is aggrieved by an entry of a rent settled in a Settlement Roll or by omission to settle a rent within the meaning of Section 104H of the B. T. A., and he has the undoubted right of bringing a suit for possession under proviso to Section 111A of the Bengal Tenancy Act.

Dispossession of a tenant by the lessee of the landlord is equivalent to dispossession by the landlord within the meaning of Art. 3 of Schedule III of the Bengal Tenancy Act, and the period of limitation for this purpose is 2 years.

The question of abandonment of tenancy is an inference of law from proved facts and it depends upon the intention of the tenant to be gathered from proved and admitted facts. Mere non-payment of rent does not constitute abandonment, but non-payment of rent coupled with failure to take any step to bring the land under cultivation for a long period does.

Appeal by the Defendant.

Suit by the Tenant for recovery of possession of land.

The material facts will appear from the judgment.

Sitaram Banerjee, Hemendra Chandra Sen, Abinash Ghosh, Saroj Kumar Maity and Nirmal Chandra Sen for the Appellant.

Provat Kumar Sengupta and Bhubesh Chandra Mitter for the Respondents.

The judgment of the Court was as follows:—

S. C. Lahiri, J.:—These two appeals are at the instance of defendant No. 1 Kshirode Narain Bhunia and they arise out of two suits instituted by the plaintiffs for a declaration of their occupancy right under the Jotdar Bankim Chandra Chakravorty (defendant No. 2) and for confirmation or in the alternative for recovery of possession of certain lands in the Sundarban area,

As the series of transactions by which the plaintiffs acquired their title to the land in dispute are not challenged before us, it is unnecessary to recite them in detail.

Broadly stated, the plaintiffs' case in both the suits is that they are occupancy raiyats in respect of the lands in dispute which are situate in a temporarily settled estate; that sometime in the year 1930 the embankments surrounding the lands were swept away by high floods on account of the failure of the Jotdar Bankim Chandra Chakravorty to keep them in proper repairs with the result that the entire area was flooded with saline water rendering it unfit for cultivation and the plaintiffs had to leave the lands against their wishes without any intention of abandoning their rights; that sometime in 1935-36 the plaintiffs came back and started repairing the embankments and began cultivation after 2 or 3 years; that during the last revisional settlement operation defendant No. 1 asserted that he had taken settlement of the lands from the Jotdar on the footing that the lands were in his khas possession, although in point of fact the plaintiffs had never abandoned their holdings; that at the time of the revisional survey the names of the plaintiffs were recorded as tenants by the settlement officer but defendant No. 1 took an appeal against the decision of the settlement officer and the Director of Land Records, by an order, dated May 15, 1943, reversed the order of the settlement officer, holding, *inter alia*, that defendant No. 1 was the tenant under the Jotdar, and that the plaintiffs had abandoned their holdings and directed that the name of defendant No. 1 should be recorded as a tenant under the Jotdar; that the decision of the Director of Land Records which was illegal and without jurisdiction had cast a cloud upon the plaintiffs' title for which the plaintiffs instituted the two suits for the reliefs mentioned above.

Second Appeal No. 264 of 1948 arises out of Title Suit No. 84 of 1944 which was instituted on October 23, 1944 and second appeal No. 265 of 1948 arises out of Title Suit No. 87 of 1944 which was instituted on November 4, 1944.

Both the suits were contested by defendant No. 1. His defence in both the suits, so far as is material for the purpose of the present appeals was that the suits were barred by the

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provisions of section 104J of the Bengal Tenancy Act; that they were also barred under Article 3 Schedule III of the Bengal Tenancy Act and the Special Rule of Limitation under Section 104H of the Act; that the suits were bad for non-joinder because the old Jotdar Bankim Chandra Chakravorty had parted with his interest in favour of his daughter Sudha Rani Debi before the revisional survey and although the name of Sudha Rani Debi had been recorded in the finally published record of rights, she had not been impleaded as a defendant; that the plaintiffs had abandoned their holdings and accordingly the Jotdar had every right to settle the lands with defendant No. 1 which he did by a patta, dated May 27, 1936, and that after taking settlement from the Jotdar defendant No. 1 started reclaiming the lands by repairing the embankments, cutting down jungles, erecting kutchery ghars and by actual cultivation.

Both the suits were dismissed by the Subordinate Judge who tried them by two decrees but those were reversed by the Extra Additional District Judge by two decrees from which defendant No. 1 now appeals.

Mr. Banerjee, appearing in support of the appeals, has argued in the first place, that the suits are barred under section 104J of the Bengal Tenancy Act. To appreciate this point, it is necessary to state certain undisputed facts.

At the commencement of the revenue settlement operations in respect of the disputed lands, the plaintiffs claimed that they were in possession of the disputed lands as occupancy raiyats and that their interest had not been extinguished on account of their temporary absence due to inundation by saline water. This claim was resisted by defendant No. 1 on the strength of the patta which he had obtained from the Jotdar Bankim Chandra Chakravorty on May 27, 1946.

In a proceeding under section 103A of the Bengal Tenancy Act the Revenue Officer disallowed the plaintiff's claim and in the record of rights which was finally published under section 103A(2) the name of defendant No. 1 was shown as the tenant in possession. The plaintiffs then filed an objection under section 104E of the Bengal Tenancy Act and the Revenue Officer

upheld their objection with the result that the names of the plaintiffs were recorded as tenants. Against the order of the Revenue Officer under section 104E of the Bengal Tenancy Act defendant No. 1, filed an appeal to the Director of Land Records and that officer, by an order dated May 15, 1943, allowed the appeal and directed that the name of defendant No. 1 should be recorded as the tenant upon a finding that the plaintiffs had abandoned their tenancy and that defendant No. 1 had acquired a valid title on the strength of the patta, dated May 27, 1936, and that defendant No. 1 was in possession on the strength of his patta. The order of the Director of Land Records is Ext. E and it was made in the presence of the plaintiffs, defendant No. 1 and Sudharani Debi who had acquired the interest of Jotdar Bankim Chandra Chakravorty.

Mr. Banerjee argues that it was the duty of the plaintiffs to instituted a suit under section 104H of the Bengal Tenancy Act within a period of six months from the date of the final publication of the record of rights and as the plaintiffs failed to do that, the entry in the record of rights became conclusive under section 104J of the Bengal Tenancy Act. This argument was accepted by the trial Court but rejected by the Court of appeal below. In support of his contention Mr. Banerjee has relied upon the decision of the Privy Council in the case of *Kumar Chandra Singh Dudhoria* v. *Midnapore Zemindary Company Ltd.* (1). Prior to this decision it was held by this Court, following a series of previous decisions, that only the entry as to the amount of rent fixed by the Revenue Officer become conclusive under section 104J of the Bengal Tenancy Act. The question whether the tenant was actually liable to pay the rent thus fixed on account of a previous contract between him and the holder of the estate was not within the scope of the enquiry of the Revenue Officer under sections 104A to 104G of the Bengal Tenancy Act and no suit under section 104H would be necessary if the tenant asserted that in spite of the rent fixed being fair and equitable, the landlord had no right to realise it by reason of a previous contract. In other words, the Revenue Officer in fixing a fair and equitable rent under Part II of Chapter X of the Bengal Tenancy Act had jurisdiction to determine the same in an ideal sense and he had no jurisdiction to

(1) (1948) 46 C.W.N. 803.

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decide whether the landlord had a right to realise it. This view was over-ruled by the Privy Council which held that under sections 104A to 104F of the Bengal Tenancy Act the Revenue Officer had jurisdiction not only to determine the amount of rent in an ideal sense but also to determine the question of liability. This case is an authority for the proposition that if between the recorded landlord and the recorded tenant a dispute arises on the question whether the tenant is liable to pay rent at the contractual rate, or at the rate entered in the record of rights prepared under Part II of Chapter X of the Bengal Tenancy Act, the tenant is bound to pay at the rate entered in the record of rights in the absence of a suit under section 104H of the Bengal Tenancy Act.

In the appeals before us, however, the facts are entirely different. In these appeals there is no dispute as to the amount of rent and the plaintiffs have also not been recorded as tenants and so far as the record of rights is concerned, they are complete strangers. The present plaintiffs cannot in any sense be said to be persons who are "aggrieved by an entry of a rent settled in a Settlement roll . . . . . or by an omission to settle a rent" within the meaning of section 104H of the Bengal Tenancy Act. Their only grievance is that they should have been recorded as tenants under the Jotdar in the place of defendant No. 1. Such a suit in our opinion, does not fall within the scope of section 104H of the Bengal Tenancy Act. Reliance was placed by the appellant upon the provisions of section 104A (2) of the Bengal Tenancy Act which requires that the settlement roll should show the name of each landlord and each tenant whose rent has been settled; but the decision by the settlement officer on every point cannot be the subject-matter of a suit under section 104H of the Bengal Tenancy Act. A suit for a declaration that the name of the tenant has been wrongly recorded in the record of rights is not a suit under section 104H of the Bengal Tenancy Act. The conclusive presumption under section 104J attaches only to "rents settled under sections 104A to 104G in respect of which a suit could have been instituted under section 104H." As the suits out of which the present appeals arise cannot, in our opinion, be said to be suits relating to an entry of rent, or an omission to settle a rent, the conclusive presumption under section 104J is not

available to defendant No. 1. We are accordingly of the opinion that the decision of the Judicial Committee in the case of *Kumar Chandra Singh Dudhoria* v. *Midnapore Zemindary Company Ltd.* (1), does not apply to the facts of these appeals and the present suits are not barred under section 104H or section 104J of the Bengal Tenancy Act. We ought to mention that Mr. Sen Gupta for the respondents invited our attention to the decision of the Supreme Court in the case of *Aukland Jute Company Ltd.* v. *Tulsi Chandra Goswani* (2). In that case the rent was assessed upon a diara land by the revenue authorities purporting to act under section 9 of Regulation VII of 1822 and section 2 of Act XXXI of 1858 and it was decided that the provisions of the Bengal Tenancy Act were not applicable. A Division Bench of this Court held that the provisions of Regulation VII of 1882 regarding Appeal to Board and the right of suit are in *pari materia* with the provisions in Part II Chapter X of the Bengal Tenancy Act and the consequences of not availing oneself of those provisions must be the same. This view was negatived by the Supreme Court which pointed out the distinction between the provisions of Regulation VII and those of part II Chapter X. In our opinion, this decision is no authority with regard to the interpretation of the relevant provisions contained in Part II Chapter X of the Bengal Tenancy Act. Moreover in this case also the dispute was between the recorded landlord and the recorded tenant as to the amount of rent payable by the latter. We are accordingly of the opinion that this decision does not assist the respondents. But for the reasons which we have already given we cannot accept the first point raised by the appellant. If, as we have already held, sections 104H and 104J of the Bengal Tenancy Act stand out of their way, the plaintiffs have the undoubted right of bringing the present suits under the proviso to section 111A of the Bengal Tenancy Act.

The second point raised by Mr. Banerjee in support of the appeals is that the suits are bad for the non-joinder of Sudharani Debi who had acquired the interest of Jotdar Bankim Chandra Chakravorty sometime before the commencement of the revisional survey operations and whose name had been

(1) (1941) 46 C.W.N. 802.

(2) [1950] S.C. 17.

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recorded as the Jotdar in the record of rights prepared under Part II Chapter X of the Bengal Tenancy Act. It appears that though this point was specifically raised by defendant No. 1 in his written statement, the plaintiffs allowed the suits to proceed against the old Jotdar who was impleaded as defendant No. 2 in both the suits. The court of first instance upheld this plea of defendant No. 1 and adopted this as one of the reasons for dismissing the suits, but unfortunately the court of appeal below has reversed the decision of the first Court without even adverting to this point. We have, therefore, to consider whether the declaration asked for by the plaintiffs can be granted in the absence of the present Jotdar Sudharani Debi.

I have already stated that the Director of Land Records made his order, dated May 15, 1943, in the presence of Sudharani Devi and it appears that her name has been recorded as the Jotdar in the revisional record of rights with defendant No. 1 as her tenant. She will, therefore, have the undoubted right of suing defendant No. 1 for rent and will not be bound by the decision in these suits as she is no party thereto. On the other hand, if the plaintiffs are granted decrees for recovery of possession on declaration of their title against defendant No. 1 and Bankim Chandra Chakravorty, defendant No. 1 will forever be precluded from possessing the land. In other words, defendant No. 1's liability for rent to Sudharani Devi will continue although his right to possess the land will be barred. This is the anomaly which will result if the plaintiffs succeed in getting a declaration of their title in the absence of the present Jotdar and in the presence of the old Jotdar.

Mr. Sen Gupta, appearing for the respondents made a determined attempt to get out of this difficult position by arguing that neither the present Jotdar nor the old Jotdar is a necessary party to these suits and that the old Jotdar Bankim Chandra Chakravarty was unnecessarily impleaded as defendant No. 2. Having regard to the fact that the plaintiffs proceeded with the suits with Bankim Chandra Chakravorty as a necessary party in the two courts below, it is hardly open to them to argue in the third court that he is not a necessary party. But apart from this, having regard to the frame of the suits and the allegations made in the plaints, we are of the opinion that the

Jotdar is a necessary party in these suits. In the plaints the plaintiffs alleged that defendant No. 1 took settlement by an alleged patta, dated May 27, 1936, and succeeded in getting an erroneous order from the Director of Land Records on the basis of the said patta, but the occupancy rights of the plaintiffs had not in any way been affected by that patta. The object of the suits is evidently to get rid of the claim asserted by defendant No. 1 on the strength of the patta granted by the Jotdar. In this view of the matter the old Jotdar was impleaded in both the suits as defendant No. 2, so that the plaintiffs might get an effective declaration in his presence. We accordingly hold that the Jotdar is a necessary party to these suits.

Mr. Sen Gupta relied upon a decision of this Court in the case of *Sabirer Ma* v. *Behari Mohan Pal* (1), in support of the proposition that in a suit for declaration of a tenancy right the landlord is not a necessary party. The case cited, however, only lays down that in a suit for declaration of the right of pasturage the superior landlord is not a necessary party in the absence of any allegation against him. In the present appeals, as I have already pointed out, the plaintiffs were making an attempt to get rid of the claim made by defendant No. 1 on the strength of a patta obtained by him from the landlord. In that view of the matter the case cited by Mr. Sen Gupta does not really help him. It is possible to conceive of cases where the landlord is not a necessary party in a suit for declaration of a tenancy right; for example, where a person asks for a declaration of tenancy right on the ground of wrongful dispossession by a trespasser without making any reference to any act of the landlord. But where, as here, the object of the suit is to nullify the effect of a lease granted by the landlord to the defendant, and where the landlord has been actually impleaded on that footing, the principle of the decision in the case of *Sabirer Ma* v. *Behari Mohan Pal* (1), cannot apply. I have already pointed out the anomaly that will result in the event of the plaintiffs' success in the absence of the present Jotdar. The question, therefore, is whether in view of that anomaly we shall be justified in granting the declaration in favour of the plaintiffs. It is a well settled proposition of law that the grant of a declaratory decree is in the discretion of the court and that the court will

(1) [1928] A.I.R. Calc. 23.

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not be justified in granting a declaration if it has the effect of creating anomalies, or leading to multiplicity of suits. We have accordingly reached the conclusion that we shall not be justified in granting the declaration asked for by the plaintiffs in the absence of the present Jotdar Sudharani Devi.

The third point urged by Mr. Banerjee for the appellant is that these suits are barred by the Special Rule of Limitation under Schedule III Article 3 of the Bengal Tenancy Act. It is urged that the plaintiffs were dispossessed by the Jotdar through the instrumentality of defendant No. 1 by creating a lease in his favour on May, 27, 1936, and as the present suits were instituted in 1944, beyond two years from the date of the patta, the suits are barred under the Special Rule of Limitation of two years under Schedule III Article 3 of the Bengal Tenancy Act. On this point also, the courts below differed in their conclusions, but we are bound by the finding of fact arrived at by the lower appellate Court are to the effect that in 1937 defendant No. 1, after obtaining the lease from Jotdar, began to construct embankments and gradually began to reclaim the land by cutting jungles and that defendant No. 1 began to possess the land at least from 1938. The further finding is to the effect that the plaintiffs were in constructive possession till 1936-37; that defendant No. 1 did not drive out the plaintiffs from the disputed land; that defendant No. 1 came into possession of the disputed land which remained fallow; and that there was therefore, no real dispossession of the plaintiffs. In the plaints, however, the plaintiffs alleged that the disputed land remained under saline water for about 3 or 4 years from 1930 on account of the failure of the Jotdar to keep the embankments in proper repairs, for which reason the plaintiffs had to leave the land, and they approached defendant No. 2 to repair the embankments. But as he failed to do it, the plaintiffs came back towards the end of 1342 B.S. (corresponding to the beginning of 1936) and started re-construction of the embankments and cutting jungles and thereafter started actual cultivation. On their own showing therefore the plaintiffs were in actual possession from the beginning of 1936. In coming to the conclusion that the plaintiffs were in constructive possession till 1936-37, the learned Additional District Judge evidently over-looked this

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plaintiffs were in possession till 1930 when the embankment was washed away by high floods. As the land was inundated in 1930, the plaintiffs left the land and removed to a place which is at a distance of 20 miles from the abad. It is further admitted that the plaintiffs left the land without making any arrangement for payment of rent. It is also admitted that between 1930 and the beginning of 1936 the land remained subject to periodical tidal inundation on account of the breaches in the embankment. The only controversy between the parties is with regard to the question whether the action of the plaintiffs in leaving the abad without making any arrangement for the payment of rent was voluntary or involuntary. On this point, as with regard to other points, the courts below arrived at different conclusions. The trial court held that the plaintiffs left the land voluntarily, whereas the appellate court held that they left involuntarily. For a solution of this question both the courts below embarked upon an enquiry as to whether the Jotdar was liable to keep the embankment in repairs and whether he was liable to re-construct it after it had been washed away by the floods of 1930. The plaintiff's case in the plaints is to the effect that it was the Jotdar who was responsible for the repair and maintenance of the embankments, and as he failed or neglected to perform his duty, the plaintiffs were compelled to leave the abad against their wishes. The trial court points out that the pattas, Exts. 1 and 1-1A granted in favour of the plaintiff's predecessor, did not contain any provisions as to the liability of the Jotdar, whereas the appellate court holds that these pattas do not throw the liability on the tenants. The documentry evidence adduced by the parties is, therefore, inconclusive. We have, therefore, to examine the surrounding circumstances to arrive at a finding on the point. The trial court relies upon the fact that one Hem Naskar who was a tenant of the adjoining abad himself repaired the embankments, but the appellate court holds that since the lease of Hem Naskar is not on the record, no conclusion can be based upon it. We think the appellate court was not right in brushing aside this fact on account of the absence of Hem Naskar's lease. When the documentary evidence on the record is inconclusive, the court is justified in enquiring into the conduct of the tenants of the disputed abad as well as of neighbouring abads, for the purpose of arriving at a correct conclusion. In the plaints, the plaintiffs admit that when they

returned to the abad in the beginning of 1936, some of the tenants of the abad along with Makbarali, the plaintiffs predecessor-in-interest, started repairing the embankments, as the Jotdar failed to do so. It has also been found that defendant No. 1, after getting his patta from the Jotdar, began to repair the embankments in 1936 although there is no provision in his patta, Ext. A, throwing the liability on him. From these facts it can be reasonably inferred that the liability for the repair of the embankment was on the tenants and not on the Jotdar. The appellate court holds that the evidence on the plaintiffs' side shows that according to the terms of the leases the lessor was bound to repair the bund. The leases in favour of the plaintiff's predecessor are Exts. 1 and 1A. They however do not contain any such term. If that be so, it is difficult to realise how oral evidence was admissible to add to the terms of the leases. We have, therefore, no hesitation in setting aside this finding as it is based on inadmissible evidence. The result of the foregoing discussion is that the plaintiffs cannot be said to have been compelled to leave the land on account of any inaction on the part of the Jotdar against their wishes and that they left the land voluntarily in 1930.

Assuming, however, that it was the Jotdar's legal duty to maintain and repair the bund, it is to be noticed that the plaintiffs have signally failed to prove that they made any attempt to enforce this legal liability of the Jotdar between the period of 1930 and 1936. There is no finding and no evidence worth the name to show that the plaintiffs ever approached the Jotdar, or took any steps under the Bengal Embankments Act to compel him to repair the embankment. If the plaintiffs had the intention to return to the abad after they had left it in 1930 and if they thought that it was the Jotdar's duty to repair the bund, it is reasonable to expect that the plaintiffs should take some steps to compel the Jotdar to do his duty, but nothing was done. Moreover, there is neither any allegation nor any proof to the effect that the plaintiffs made any offer of rent to the Jotdar after they began actually possessing the land on their return in the beginning of 1936. From these circumstances the conclusion is irresistible that when the plaintiffs left the abad in 1930, they had no intention to return to it. This inference is also borne out by the recitals in the patta, Ext. A, in which the

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Jotdar states that the recorded tenants had left the land since 1356 (corresponding to 1929-30) and that they had not exercised any act of possession, nor made any arrangement for the payment of rent since that time, and from those facts he was led to believe that those tenants had become "ferari." The literal meaning of the Bengal expression "ferari" is untraceable, but in the context in which that expression is used in that patta we think, differing from the lower appellate court that by that expression the Jotdar intended to mean that the old tenants had abandoned their holdings; otherwise he could not assert his right of granting a new settlement to defendant No. 1. The question of abandonment is an inference of law from proved facts and it depends upon the intention of the tenants to be gathered from proved and admitted facts. It is true that mere non-payment of rent does not constitute abandonment, but non-payment of rent coupled with failure to take any step to bring the land under cultivation for a long period which is found to be six or seven years in the present appeals does. Mr. Sen Gupta appearing for the respondents pointed out that the landlord did not comply with the requirements of section 87 of the Bengal Tenancy Act. But it is well settled that section 87 is not exhaustive and it does not prescribe the only mode in which the holding can be treated as having been abandoned.

Upon a consideration of all the facts and circumstances enumerated above, we agree with the trial court that the old tenants abandoned their holdings and the lower appellate court was wrong in coming to a different conclusion. The fourth point argued for the appellant must accordingly succeed.

We ought to mention that Mr. Banerjee also faintly argued that the decision of the Director of Land Records, Exh. E, operates as res-judicata in the present suit and relied upon the decision of the Supreme Court in the case of *Sreemati Raj Lakshmi Dasi* v. *Banamali Sen* (1), for this purpose. We find it impossible to give effect to this argument for a variety of reasons. Apart from the fact that this question was not raised in any of the courts below, with the result that the plaintiffs had no opportunity of testing whether the parties to the present suits were also parties to the appeal before the Director of Land Records, the plaintiffs have a statutory right under section 111A

(1) [1953] A.I.R. (S.C.) 33.

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of the Bengal Tenancy Act of challenging the entry in the record of rights prepared on the basis of the decision of the Director of Land Records. The Director of Land Records cannot accordingly be said to have an exclusive jurisdiction to determine the question raised before him. We have therefore, no hesitation in rejecting this last contention raised on behalf of the appellants.

For the reasons given above, these appeals must be allowed; the judgment and decrees of the lower appellate court must be set aside and the decrees of the Court of first instance restored with costs in all the courts.

S. C. Lahiri, J.

J. P. Mitter, J.:—I agree.

S.G.P. *Appeals allowed with costs.*

APPELLATE CIVIL.

Before Mr. Justice Rama Prasad Mookerjee and Mr. Justice Renupada Mukherjee.

ARUNENDRA NATH CHATTERJEE & ORS.

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Pauper Appeal—Civil Procedure Code—Order XLIV—Proviso to Rule 1 Order XLIV—Rule on the opposite party—Whether at the hearing of the Rule the Court may go into the question whether the decree is contrary to law or to some usage having the force of law—Scope of enquiry at the hearing of the Rule.

The Court has, no doubt, jurisdiction to reject a petition at the *ex parte* hearing if the Court finds that there is no *prima facie* case even for issuing a notice upon the opposite party. But it is unquestionable that even though at the preliminary stage the Court did not reject the petition under Rule 5 of Order XXXIII, it is open to the Court to hear objection raised by the opposite parties and the Government Pleader even on points which arise on Rule 5, and arrive at a decision that the application is not maintainable.

* Civil Rule No. 172 (f) of 1953 against the Judgment and Decree of the Court of the President, Calcutta Improvement Tribunal, passed in case No. 2 of 1951 (apportionment) dated 17th November, 1952.

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For the purpose of issuing notice a Court may at the preliminary stage come to a decision only as a preliminary one for issuing a rule; that cannot and ought not to be taken to be final decision which would be binding on the opposite parties who have no opportunity to make any submission before the Court.

The fact that the Court did not reject the application before issuing notices to opposite parties and the Government pleader did not debar them from considering the question and having the prayer to sue as a pauper rejected.

There is no occasion for the Court to consider at the initial stage, when an application is filed, to consider whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. If the applicant is not a pauper, the Court is not called upon to enter into a consideration as required under the last portion of the proviso to Rule 1 of Order XLIV of the Civil Procedure Code.

Application for leave to Appeal in *forma pauperis*.

The material facts will appear from the judgment.

Probodh Krishna Shome and Benoy Krishna Ghosh for the Petitioners.

S. M. Mallik and Promode Kumar Banerjee for the Respondents.

Hemendra Kumar Das for the State.

The judgment of the Court was as follows:—

Rama Prasad Mookerjee, J.:—The two petitioners before us filed an application on January 2, 1953, for leave to appeal in *forma pauperis* along with a memorandum of appeal. On January 22, 1953, this Rule was issued upon the opposite parties to show cause why the petitioners should not be allowed to file the appeal in this Court in *forma pauperis* or such further or other order or orders made as to this Court might seem fit and proper. Pending the hearing of this Rule records were sent down to the President, Calcutta Improvement Tribunal, for enquiry as to the alleged pauperism of the petitioners after giving notice of the same to the Government Pleader and the opposite parties. The Rule was directed to be set down for hearing in the presence of the opposite parties and of the Senior Government Pleader, High Court, to whom also notice of the Rule was directed to be issued.

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On receipt of the report from the President of the Calcutta Improvement Tribunal about the enquiry held by him in the presence of all the parties and the Government Advocate this Rule has been set down for hearing.

Before we deal with the merits of the application, we have to deal with the contention raised by the learned Advocate appearing in support of the Rule that at the present stage we are limited to an enquiry as to the pauperism of the two petitioners. He contended that after the Rule had been issued on the opposite parties the Court must be taken to have already been satisfied that the decree against which the appeal is to be preferred was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust. He relied upon certain decisions to which reference will be made hereafter.

It is contended on behalf of the petitioners that the procedure envisaged under rule 1 of order XLIV of the Code of Civil Procedure is that when an application is filed by a person accompanied by a memorandum of appeal praying to be allowed to appeal as a pauper the Court is required, in the first instance, to peruse the application and the judgment and decree appealed from and to consider whether the decree is one contrary to law or to some usage having the force of law or is otherwise erroneous or unjust as provided in the proviso to the said rule. It is only after the Court is so satisfied that a Rule may be issued by the Court for a decision in the presence of the opposite party as to whether the petitioners should be allowed to prefer the appeal in *forma pauperis*.

The practice in this Court has, as far as I know been contrary to what has been contended before us by the learned Advocate for the petitioners. However long a practice may be, if the provisions of the law require a different procedure to be followed, the practice is to be set right. It is, therefore, necessary for us to consider without reference to the practice which has been in vogue in this Court as to what was the intention of the Legislature so far as the disposal of applications for being allowed to appeal as paupers may be concerned.

On the face of it the proviso would be attracted only if the applicant is found by the Court to be a pauper. There is no

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occasion for the Court to consider at the initial stage, when an application is filed, to consider whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. If the applicant is not a pauper, the Court is not called upon to enter into a consideration as required under the last portion of the proviso.

R. P. Mookerjee, J.

The Court has, no doubt, jurisdiction to reject a petition at the *exparte* hearing, if the Court finds that there is no *prima facie* case even for issuing a notice upon the opposite party. If reference is made in this connection to the provisions contained in Order XXXIII of the Code of Civil Procedure which deals with suits by paupers the procedure which is followed there will immediately become clear. Rule 5 of XXXIII lays down certain conditions to be fulfilled by an applicant who wants to sue as a pauper, and if the Court finds that any one or more of these conditions are not fulfilled the application may be dismissed *in limine*. If the Court during the hearing at that preliminary stage does not think that the application should be rejected then under rule 6 of the same Order the Court is to fix a date for hearing the opposite party and the Government Pleader, and the final order will be passed as laid down in rules 7 and 8 of the same order. It is unquestionable that even though at the preliminary stage the Court did not reject the petition under rule 5 of Order XXXIII, it is open to the Court to hear objections raised by the opposite parties and the Government Pleader, even on points which arise on rule 5, and arrive at a decision that the application is not maintainable. The Court would be justified and would be acting within its jurisdiction to pass the final order when the final hearing takes place in the presence of the opposite parties.

In the first paragraph of rule 1 of the order XLIV of the Code of Civil Procedure it is made abundantly clear that the application which may be presented by a petitioner for leave to appeal in *forma pauperis* is

> "subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far those provisions are applicable."

Such provisions as are contained in Order XXXIII relating to suits by paupers are attracted in so far as they are applicable to applications for permission to file appeals in *forma pauperis*.

The procedure as laid down in Order XXXIII, therefore, though not reproduced in terms in Order XLIV, has been made applicable by specific reference in rule 1 of Order XLIV.

The interpretation I have given is also supported from first principles, if we look at it from another angle of vision. It is now well settled as a rule of jurisprudence that *ex parte* orders should not be passed by a Court as final orders without giving an opportunity to the parties affected to make their submissions thereon. If the interpretation which we have been asked to accept by the learned Advocate for the petitioners were to be given effect to, the position will be that a decision is reached by the Court before the opposite parties have appeared in the case and while dealing with the application at the *exparte* stage the opposite parties are denied the fundamental right of being heard before a final decision is made against them. For the purpose of issuing notices a Court may at the preliminary stage, come to a decision, only as a preliminary one for issuing a Rule; that cannot and ought not to be taken to be final decision which would be binding on the opposite parties who had no opportunity to make any submission before the Court.

This interpretation of the terms of the provisions contained in rule 1 of Order XLIV of the Code of Civil Procedure is in consonance with the interpretation put on these provisions in all the different High Courts in India although in some of the Courts a contrary view had at one stage or other been expressed, but within a short time a Full Bench had set the matter right. I would just indicate in support the trend of decisions in other High Courts which support the conclusion which I have indicated above.

In the Patna High Court the practice which was in force in Calcutta was being followed and the opposite party was being heard before a final decision was reached not only on the question of pauperism, but also on the question whether the decree appealed against was contrary to law or to some usage having

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the force of law or otherwise erroneous or unjust until Sir Dawson Miller, in *Bachan Dai* v. *Jugal Kishore* (1), sitting singly expressed himself in a different way. This view was followed in *Raghunath Prasad* v. *Must. Ram Piari* (2), and *Must. Bibi Sogra* v. *Radhakishun* (3). The next year, however, the matter was referred to a Full Bench in *Tilak Mahton* v. *Akhil Kishore* (4). The question which was submitted to the Full Bench was whether during the hearing of the Rule under Order XLIV Rule 1 the question whether the judgment was contrary to law could be considered. The answer was in the affirmative; and it was observed that notwithstanding the fact that the Court while dealing with the application *ex parte* did not think that any of the grounds mentioned in rule 5 of Order XXXIII existed for rejecting the application, it was bound to reject it when the other side came and showed that the application was fit to be rejected on any of the grounds mentioned in that rule. The fact that the Court did not reject the application before issuing notices to the opposite party and the Government Pleader did not debar them from considering the question and having the prayer to sue as a pauper rejected.

The procedure as laid down in Order XXXIII is introduced into Order XLIV, and the same should be followed in dealing with applications by paupers for permission to file appeals. This has been the law in Patna ever since.

The view expressed by the Patna High Court in the Full Bench case referred to above was accepted in *Banarsi Das* v. *Munshi Ram* (5).

In the Oudh Court for some years the earlier view of the Patna High Court as also a single Judge decision of the Allahabad High Court had been accepted, until in *Habshi Mian* v. *Mehdi Hasan* (6), the law was settled as interpreted by the Full Bench of the Patna High Court.

Similarly in *Powdhari* v. *Ram Sanwari* (7), the earlier decision of a single Judge in *Hubraji* v. *Balkaran Singh* (8), was overruled and the law was interpreted as already stated above.

(1) [1924] A.I.R. Pat. 791 (2) (1928) I.L.R. 6 Pat. 687.
(3) (1928) I.L.R. 7 Pat. 825. (4) (1931) I.L.R. 10 Pat. 606 (F.B.).
(5) (1933) I.L.R. 15 Lah. 182. (6) [1937] A.I.R. Oudh 222 (F.B.).
(7) (1934) I.L.R. 57 All. 440 (F.B.) (8) (1931) I.L.R. 54 All. 394.

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In *Mutturi Suryanarayanamurtyi's Case* (1), it was held that when the Appellate Court received an application for leave to appeal in *forma pauperis* and without considering whether or not there was any substance in the appeal notice was issued to the respondent the Judge at the time of the final hearing was entitled to rescind his earlier order issuing notice—if on considering the questions of the merits he came to the conclusion that leave ought not to be granted. It was, however, observed that when the question of merits had been considered before issuing the notice, it might not be open to the Court to reconsider it after notice. This was a decision of a Judge sitting singly. There is however an earlier decision by a Division Bench of that Court *S. K. M. R. M. Somasundaram Chettiar* v. *R. A. A. R. Arunachalam Chettiar* (2), where it was definitely laid down that an *exparte* order granting leave to appeal in *forma pauperis* was not binding on the respondent and did not preclude him from arguing at a later stage that there was no substance in the appeal. Considering even the fact that there was a long standing practice in that Court not to hear the respondent at the stage when after notice to the respondent the application for leave to appeal was to be heard finally, it is open to the Court to hear the respondent at that stage. The respondent may as a matter of indulgence be, but is not entitled as of right to be, heard on the question whether the decision of the Court below is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. Though in that particular case the Court granted the pauper application, hearing of the respondent at that stage can only connote that the Court had jurisdiction to decide after hearing the respondent that the application should not be granted on the merits.

So far as the Bombay High Court is concerned in *Ladobi Shaikh Umar* v. *Sankarlal Pannalal Kalantri* (3), Stone, C.J. and Dixit, J. while discussing the procedure which should be followed under Order XLIV, Rule 1 observed:—

> "It is contended on behalf of the respondent that the Court should first see if the requirements of the proviso to rule 1 are satisfied. This involves the assumption that the applicant is a pauper. It seems to us that the first thing

(1) (1936) 71 M.L.J. 497.
(2) (1932) I.L.R. 55 Mad. 982.
(3) (1947) 50 Bom. L.R. 133.

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to do is to see that the applicant is a pauper. If he is, the next thing to do is to see if the conditions in the proviso to rule 1 Order XLIV are satisfied. If the applicant is not a pauper, there is no question of compliance of the terms of the proviso."

It is not necessary at the initial stage, as was pointed out by the Division Bench, for the Court to arrive at a definite conclusion that the decree complained against is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, and merely because the Court has issued a Rule calling upon the opposite party to show cause why the petitioner should not be allowed to file an appeal in *forma pauperis* does not debar the court from considering all the questions which arise, and particularly so after giving a hearing to the opposite party and also to the Government Pleader, if notice has been given to him as well.

In this view we must overrule the objections raised by the petitioners that the Court is not competent to enter into the question at this stage as to whether the decree proposed to be appealed against is one hit by the proviso to rule 1 of the Order XLIV of the Code.

While dealing with the question as to whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, the only papers which the Court is called upon to and can look into the petition presented to this Court, and the copies of the judgment and decree. It has been repeatedly pointed out that it is not for the Court for the purpose of this enquiry to hold that the decree is contrary to law; but if the Court has reason to think that the decree is contrary to law, that will be sufficient under the proviso. There has been some difference of opinion as to the exact nature of the finding which the Court can reach. In the *case of Peram Chennamma* (1), petitioner appellant, the Court held the view that if there was a substantial question of law and the appellant was a pauper, permission would be given as a matter of course. But three years later in *Thirupuraneni Narayana Rao* v. *Soorapaneni Veerayya* (2), the Court pointed out that it was not so. The difference in the tests to be applied between an application filed to sue as a pauper and an appli-

(1) (1929) I.L.R. 53 Mad. 245. (2) (1933) I.L.R. 56 Mad. 323.

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cation filed for permission to prosecute an appeal in *forma pauperis* is fundamental and well marked. While in the case of an application by a pauper for permission to sue, he is to follow a particular procedure, and with regard to the merits of the claim in the proposed suit no enquiry is to be made by the Court, although the court is to look into whether there is a cause of action. In the case of an application by a pauper for permission to file an appeal in *forma pauperis*, however, he is to satisfy the Court, as in the proviso to rule 1 of Order XLIV, that the Court has reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. In the case of a pauper appeal therefore, the court is called upon to examine the merits of the appeal and not merely whether the pauper has got a cause of action. The proviso is a mandatory one, and contemplates that on a perusal of the application, the judgment and decree, and nothing else, the Court would come to the view that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.

Keeping this in view, we proceed to consider the report submitted by the President of the Calcutta Improvement Tribunal about the pauperism of the two applicants. One of the applicants has been found to be a pauper and the Government Advocate also did not before us raise any objection thereto. With regard to the other applicant, the report of the President is that the applicant is drawing a substantive pay of Rs: 130/- per month with dearness allowance. No evidence could be adduced by the opposite parties before the President that the applicant had got any property from which he could pay the Court fees required to be paid in his share. The learned President, however, expressed the view that he must have saved sufficient funds during the period of his service. That is not the test to be applied. Whether a person earning a particular amount per month should or could have saved sufficent funds for filing an appeal hereafter is not a matter into which the Court can enter into, there being no evidence on the record to contradict the statement by the applicant that he had not sufficient funds. It must be held that he also should be declared to be a pauper not able to pay the Court-fees on the memorandum of appeal.

On the conclusion reached that both the applicants are

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paupers, we proceed to consider whether the proviso to rule 1 of Order XLIV of the Code of Civil Procedure is satisfied. From the judgment, read with the petition filed in this Court, it appears that the principal question, so far as the petitioners are concerned, is whether Sukhendra, the father of the other claimants opposite parties, was the son of Sri Krishna through Rajendra Bala. The whole question depends on the evidence as led by the parties. From the discussion of the respective cases, as they appear in the judgment of the President, there is no excape from the conclusion that the decision depends as to which set of evidence is to be believed and which set is to be disbelieved. That being a pure question of fact, dependent upon the appreciation of the evidence, it cannot be said that the point for decision in the appeal is contrary to law or to some usage having the force of law. An attempt was no doubt made to rely upon the last clause in the proviso that the decree was otherwise erroneous or unjust. Without expressing our views as to the evidentiary value of the various facts brought out by both the parties all that we need say is that on the face of the judgment the decree cannot be said to be unjust. If and when the entire evidence is gone into by the Court, if the appeal is ultimately prosecuted by the petitioners, it would be for the court at the final stage to determine whether the decision is correct or incorrect. We must not be taken to have expressed any final opinion on this point. Our observations are for the limited purpose of considering whether the terms as laid down in the proviso to rule 1 of Order XLIV are satisfied. We do not think that the petitioners have been able to satisfy us.

This Rule is accordingly discharged, but in the circumstances we make no order as to costs.

The petitioners will have time till September 7, 1953, to file the required Court-fees if they intend to prosecute the appeal in the ordinary way.

As prayed for by the petitioners, we direct that the amount claimed by the petitioners and now lying in deposit with the President, Calcutta Improvement Tribunal, be retained by him for a further period of a fortnight from the date of the receipt of a copy of this order by him in order to enable the petitioners to take such further steps as they may be advised.

Renupada Mukerjee, J.:—I agree.

S.G.P. *Rule discharged.*

APPELLATE CIVIL.

Before Mr. Justice S. C. Lahiri and Mr. Justice J. P. Mitter.

NITYANANDA KAPURIA

v.

PARBATI NATH DUTTA & ORS.*

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February, 11.

West Bengal Premises Rent Control Act, 1950—Section 13(2)—Execution of the ejectment decree obtained by the Landlord against the tenant under the Rent Control Act of 1950 on the ground of default—Sub-tenant filing an application in execution proceedings under Section 47 C.P.C. alleging the acquisition of statutory tenancy right directly under the Landlord—Small Cause Court Judge as a court of the Subordinate Judge under the Bengal Agra and Assam Civil Court Act, 1887 trying an ejectment suit under the West Bengal Premises Rent Control Act, 1950 or executing a decree passed in such suit—Jurisdiction of such court to treat the proceeding under Section 47 C.P.C. as a suit under sub-section 2 of Section 47 and try the same as a suit for a declaration of the statutory tenancy right of the sub-tenant.

The landlord brought a suit for ejectment in the Calcutta Small Cause Court against the tenant on the ground of default in payment of rent under the West Bengal Premises Rent Control Act, 1950 and obtained a decree in the said suit. The Landlords put the ejectment decree into execution. Sub-tenant filed an application under Section 47 C.P.C. alleging that he had acquired the statutory right of a tenant directly under the landlords under Sub-section (2) of Section 13 of the West Bengal Premises Rent Control Act of 1950. The executing court viz., fifth Judge of Calcutta Small Cause Court came to the conclusion that the right claimed by the sub-tenant could not be agitated in a proceeding under Section 47 of the Code of Civil Procedure but must be determined by a declaratory suit. Accordingly the executing court dismissed the application filed by the sub-tenant under Section 47 C.P.C. An appeal against that decision was dismissed by the Special Bench of the Calcutta Small Cause Court on the ground that no appeal lay from an order under Section 47 C.P.C. made by the executing Court. Against that judgment the sub-tenant preferred a second appeal to the Hon'ble High Court.

*Appeal from Appellate Order No. 51 of 1953 with application against the order of Sri S. C. Sen Gupta, Chief Judge and Sri S. C. Biswas another Judge of the Special Bench of the Court of Small Causes, Calcutta, in Miscellaneous Appeal No. 968 of 1952 dated the 23rd December, 1952 affirming the order of Sri S. C. Talukdar, Judge, Fifth Bench of the Court of Small Causes, Calcutta, dated the 16th August, 1952.

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Held: The sub-tenant's application under Section 47 C.P.C. should be converted into a plaint on payment of additional court fees, if any, by the applicant and proceeding under Section 47 C P.C. should be treated as a suit for determining the sub-tenant's right under Section 13(2) of the West Bengal Premises Rent Control Act, 1950. Under Section 16 read with schedule B of the West Bengal Premises Rent Control Act, 1950, the Small Cause Court Judge functioning as a Subordinate Judge under the Bengal Agra Assam Civil Courts Act of 1887 has jurisdiction to treat the proceeding nuder Section 47 C.P.C. as a suit and try the same for determining the right claimed by the Sub-tenant under Section 13(2) of the Rent Control Act of 1950.

Appeal by the Sub-tenant.

Suit for declaration of the statutory tenancy right of the Sub-tenant.

The material facts will appear from the judgment.

Nisi Kanta Poddar and Sudhanshu Kumar Hazra for the Appellant.

A. K. Sen and Bhabesh Narayan Bose for the Respondents.

The judgment of the Court was as follows:—

S. C. Lahiri, J.:—This is an appeal by an alleged sub-tenant against a judgment of the Special Bench of the Presidency Small Cause Court dismissing his appeal from an order under Section 47 of the Code of Civil Procedure. The undisputed facts which are material for the purpose of the present appeal may be shortly stated as follows.

The appellant claims that he is a sub-tenant in respect of room No. 6 of Premises No. 13, Pageaputty Street, under respondent No. 8, Bharat Mills Agency Ltd., at a monthly rental of Rs. 85/-. Respondent No. 8 Bharat Mills Agency Ltd. was a tenant under the landlords, respondents Nos. 1 to 7, in respect of rooms Nos. 6, 30 and 31 at a monthly rental of Rs. 257-2-0. On March 13, 1952, the landlord respondents Nos. 1 to 7 obtained an *exparte* decree for ejectment against their tenant Bharat Mills Agency Ltd. on the ground of default under Clause (1) of the Proviso to sub-section (1) of section 12 of the West Bengal Premises Rent Control Act, 1950. The landlord respondents Nos. 1 to 7 then put that decree into execution against their tenant and they also sought to eject the appellant in

execution of that decree. The appellant thereupon filed an application under section 47 of the Code of Civil Procedure alleging that he had acquired the statutory right of a tenant directly under the landlord under sub-section (2) of section 13 of the Act of 1950.

The executing court came to the conclusion that the right claimed by the appellant could not be agitated in a proceeding under section 47 of the Code of Civil Procedure but must be determined by a declaratory suit.

An appeal against that decision was dismissed by the Special Bench of the Presidency Small Cause Court on the ground that no appeal lay from an order under section 47 of the Code made by the executing Court. Against that judgment the appellant has filed this appeal. It is contended before us that the decision of the Special Bench is not right. We have therefore to examine if the Court of first instance was right in its conclusions.

Mr. Poddar, appearing in support of the appeal has contended that the right claimed by his client can and should be decided in a proceeding under section 47 of the Code of Civil Procedure, because, according to him, his client is a representative of the judgment-debtor within the meaning of section 47 and therefore he is entitled to maintain his application under the said section.

The difficulty, however, of accepting this argument is that the right which is claimed by the appellant under section 13(2) of the West Bengal Premises Rent Control Act, 1950 is a right which is independent of the right of the tenant judgement-debtor. Section 13(2) of the Act provides that if the tenancy of the tenant is determined otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in clause (h) of the proviso to sub-section (1) of section 12, the sub-lessee shall be deemed to be a tenant in respect of such premises holding directly under the landlord of the tenant whose tenancy has been determined. The plain meaning of this provision is that if the landlord obtains a decree for ejectment against his tenant on any ground other than a ground of reasonable requirement, the sub-tenant becomes a statutory tenant

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directly under the landlord. It is quite clear that this right is a right which is independent of the tenant and for this reason the sub-tenant cannot be said to be privy to the judgment which was pronounced against the tenant. For this reason we are constrained to hold that the sub-tenant cannot be said to be a representative of the judgment-debtor for the purpose of asserting his rights under section 13(2) of the West Bengal Premises Rent Control Act, 1950.

Mr. Poddar invited our attention to the decision of a Division Bench of this Court in the case of *S. N. Talapatra* v. *Bengal Bonded Warehouse* (1), where it was held that if the landlord dispossesses a sub-tenant in execution of a decree obtained against the tenant, the sub-tenant has a right to apply under Order XXI Rule 100 of the Code of Civil Procedure. Although this decision was cited by Mr. Poddar, it seems to us that it goes against his contention to the effect that the right asserted by his client could be enquired into under section 47 of the Code of Civil Procedure, because Order XXI Rule 100 applies "where any person other than the judgment-debtor" has been dispossessed of immovable property in execution of a decree." If a sub-tenant is entitled to maintain an application under Order XXI Rule 100, as has been held in this case, he must be a person "other than the judgment-debtor." Section 47 of the Code of Civil Procedure applies to judgment-debtors and their representatives-in-interest, whereas Order XXI Rule 100 applies to persons "other than judgment-debtors." The decision in *S. N. Talapatra's case* (1), is, therefore, an authority for the proposition that a sub-tenant claiming rights under section 13(2) of the West Bengal Premises Rent Control Act, 1950, is a person "other than the judgment-debtor" and therefore he cannot come under section 47 of the Code of Civil Procedure. We accordingly hold that the court of first instance was correct in holding that the right claimed by the appellant could not be enquired into or ascertained in a proceeding under section 47 of the Code.

Mr. Poddar argued, in the second place, that assuming that his application was not maintainable under section 47 of the Code, the trial court had jurisdiction to convert the proceeding under section 47 of the Code into a suit. It seems that this point was raised before the trial court but that court negatived this

(1) (1953) 57 C.W.N. 455.

contention on the ground that under clause (g) of section 19 of the Presidency Small Cause Court Act that court had no jurisdiction to try the suit for a declaration of the statutory tenancy right of the sub-tenant. We cannot accept this view as correct. Under section 16, read with Schedule B of the West Bengal Premises Rent Control Act, 1950, the Small Cause Court Judge had jurisdiction to try the ejectment suit as a court of the Subordinate Judge under the Bengal, Agra and Assam Civil Courts Act of 1887 and he undoubtedly passed the decree for ejectment in this case as such a Subordinate Judge. If that be so, under section 37 of the Code of Civil Procedure, he had jurisdiction to execute the decree which was passed by him and he had also jurisdiction to entertain all objections relating to execution, discharge and satisfaction of the decree under section 47 of the Code. Consequently, under Sub-section (2) of Section 47 he had jurisdiction to treat the proceeding under section 47 as a suit on payment of additional court-fees by the appellant. We are accordingly of the opinion that the trial Court failed to exercise a jurisdiction vested in it by law upon an erroneous view that it was deciding the application under section 47 of the Code of Civil Procedure as a Presidency Small Cause Court.

For the reasons given above, although we affirm the decision of the court of first instance as to the maintainability of the application under section 47, we must send back the case to that court for the purpose of giving the appellant an opportunity of converting his application into a plaint on payment of additional Court fees if any, under sub-section (2) of Section 47 of the Code of Civil Procedure. After that is done, the usual procedure prescribed for a suit will be followed by the Subordinate Judge.

In the result, this appeal is allowed, the decree of the Court of appeal below set aside and the case sent back to the trial court for decision in the light of the observations made above. In the circumstances of this case, it is desirable that the matter should be disposed of as quickly as possible. No order is necessary on the application under section 115 of the Code.

As the point upon which the appellant succeeds in this Court was not taken in the Memorandum of Appeal in this Court, we think the appellant is not entitled to his costs.

J. P. Mitter, J.:—I agree.

S.K.H. *Appeal allowed.*

ORIGINAL CIVIL.

Before Mr. Justice R. S. Bachawat.

CIVIL.

1954

March, 1.

GENERAL DEALERS LIMITED

v.

BALLAVNARAIN BADRINARAIN.*

Arbitration—Illegal Contract—West Bengal Jute Goods Act (Act V of 1950)—Defendant not a habitual dealer of jute goods involving actual delivery of possession and has no godown for storage and supply thereof—Contract for delivery to defendant in October, November and December 1951—Portion of the good delivered and paid for—Defendant's claim for damages rejected to Arbitration of Bengal Chamber of Commerce as provided in the Contract—Plaintiff's prayer for injunction restraining the arbitrator—Code of Civil Procedure (Act V of 1908), if can be invoked for issue of such injunction—Court, inherent power of, to issue such injunction.

In the circumstances stated in the judgment the Code of Civil Procedure does not justify the issue of the injunction asked for.

It the contract is impeached for illegality the Court has inherent power to issue an injunction restraining the arbitration in appropriate proceedings.

When the inherent jurisdiction of the Court is invoked a very strong and special case must be made out. There must be plain equity, some special circumstance, some oppression, some unfair dealing necessitating the intervention of the Court and the Court must also be satisfied that there is a *prima facie* case of illegality.

Petition for issue of injunction restraining the arbitrator from proceeding with the arbitration.

The material facts will appear from the judgment.

R. C. Deb for the Petitioner.

D. C. Sethia & R. L. Sinha for the Respondent.

The following judgment was delivered:—

R. S. Bachawat, J.:—The plaintiff impeaches the contract as being illegal under the West Bengal Jute Goods Act (V) 1950 on the ground that the defendant does not habitually deal in the

* Application in *re*: Suit No. 1289 of 1953.

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sales and purchases of jute goods involving actual delivery of possession thereof and does not possess any godowns or means and equipment for storage and supply of jute goods.

The Contract provides for delivery in October, November and December 1951 and contains the usual Arbitration clause. The entire November portion and half of the December portion of the goods were duly delivered and paid for. The balance goods have not been delivered and paid for. The defendant claims damages for non-delivery and has referred the claim to the arbitration of the Bengal Chamber of Commerce. The plaintiff asked for an injunction restraining the arbitrator from proceeding with the arbitration.

The plaintiff asserts that the delivery was made under a mistake of fact. There are no materials to show that the plaintiff came to know of the alleged illegality since the making of the contract.

The Code of Civil Procedure does not justify the issue of the injunction asked for. The inherent jurisdiction of the Court is invoked.

If the contract is impeached for illegality the Court has inherent power to issue an injunction restraining the arbitration in appropriate proceedings.

When the inherent jurisdiction of the Court is invoked a very strong and special case must be made out. There must be plain equity in favour of the injunction. There must be some special circumstance, some oppression, some unfair dealing necessitating the intervention of the Court and the Court must also be satisfied that there is a *prima facie* case of illegality.

The plaintiff entered into the contract with open eyes. I cannot assume in favour of the plaintiff at this stage that the plaintiff in violation of the West Bengal Jute Goods Act V of 1950 entered into an illegal contract. There is no evidence of any oppression or unfair dealing. There are no special circumstances necessitating the intervention of the Court at this stage. There, is no equity whatsoever in favour of the injunction.

The application is dismissed with costs.

Leslie & Hinds: Solicitors for the Petitioner.

Khettry: Solicitor for the Respondent.

S.C. *Application dismissed with costs.*

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee.

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1954

January, 22 and March, 9.

DILWAR SULTAN

v.

KESHAB CHANDRA MUKHERJEE & ORS.*

Second Appeal—Competency—Calcutta Thika Tenancy Act of 1949 Section 28—Amending Ordinance of 1952—Calcutta Thika Tenancy Act (of 1953), Section 8—Repeal of Section 28 of Old Act, effect of—Locus standi *of transferor thika tenant to make application under Section 28—Court if can act* suo motu—*Court passing the decree of ejectment under old Act of 1949, if can under the Amending Ordinance of 1952 and the new Act of 1953 rescind the decree.*

K, the landlord obtained an exparte decree for ejectment against D, a thika tenant on 15th December 1948 K applied under the Thika Tenancy Act of 1949 for recission of decree on 18th September 1950, before possession was recovered. But K transferred his entire interest in the holding to one K. D. by a Kobala dated 5th May 1950, which was registered on 12th August 1950. The application by K was rejected by both the Courts below:

Held:—As possession of the holding has not been recovered from the thika tenant, he had *locus standi* to make the application.

Notwithstanding the transfer of the holding, the tenant had sufficient interest viz. (1) his liability to make good transfer and in default to suffer damages and (2) his liability under the decree for costs, to entitle him to apply under Section 28 of the Act.

The Court under Section 28 of the Act can act *suo motu* in the matter and no application is necessary to set it in motion.

In regard to proceedings pending on the date of the 1952 Ordinance, the rights acquired by a thika tenant under Section 28 of the Thika Tenancy Act, 1949 read with the said Amending Ordinance of 1952, had not been taken away by the Amending Act of 1953.

Jogilal Chamaria v. *Atul Krishna Laha* (1) dissented from

Deorajin Debi v. *Satyadhan Ghosal* (2) followed.

* Appeal from Appellate Order No. 29 of 1952 against the order of Sri N. Banerjee, Additional Subordinate Judge 3rd Court of Zilla 24 Parganas at Alipore, dated 8th February, 1952, affirming the order of Sri K. K. Dutta Gupta, Munsiff, 4th Court Alipore, dated 29th June, 1951.

(1) (1953) 57 C.W.N. 566. (2) (1953) 58 C.W.N. 64.

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Dilwar Sultan v. Keshab Chandra Mukherjee & ors.

As the decree was made admittedly before the commencement of the said Act and possession had not been recovered from the thika tenant in execution thereof, the Court which passed the decree may, if it is of opinion that the decree was not in conformity with any provision of the Calcutta Thika Tenancy Act other than sub-section (1) of Section 5 or Section 27, rescind the decree.

Hajan Chandra Dey v. *Sm. Charu Bala Dassi* (1), *Murari Mohan Mukherjee* v. *Prokash Chandra Chatterjee* (2), *Sm. Suraj Jan Bibee* v. *Banku Behari Saha* (3) *and Shaikh Mohammad Mateen* v. *Baijnath Bajoria* (4) *referred to and distinguished.*

Appeal by the judgment debtor, thika tenant.

Application under section 28 of the Thika Tenancy Act, 1949 read with Amending Ordinance of 1952.

The material facts will appear from the judgment.

Asoke Chandra Sen for the Appellant.

Basanta Kumar Panda for the Respondents.

The judgment of the Court was as follows:—

March, 9.

P. N. Mookerjee, J.:—This appeal arises out of an application under section 28 of the Calcutta Thika Tenancy Act 1949. The application was dismissed by the trial Court and the tenant's appeal from the said decision failed before the Subordinate Judge who dismissed it on the merits and also on the ground that no appeal lay from an order rejecting an application under Section 28 of the Calcutta Thika Tenancy Act of 1949. Hence this Second Appeal by the tenant who has also filed an application in the alternative under Section 115 of the Code of Civil Procedure for revision of the orders of the two courts below.

A preliminary objection has been raised to the maintainability of the second appeal, but in view of the alternative application in revision and the nature of the questions involved in this case, it is not necessary to examine the merits of the said objection.

(1) (1948) 53 C.W.N. 553.
(2) (1949) 53 C.W.N. 640.
(3) (1949) 54 C.W.N. 281.
(4) (1949) 54 C.W.N. 287.

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P. N. Mookerjee, J.

On the 15th December 1948 the respondents landlords obtained an exparte decree for ejectment against the tenant appellant. Before, however, possession could be recovered in execution of the decree the tenant judgment-debtor applied under Section 28 of the Thika Tenancy Act of 1949 which had come into force in the meantime, for rescission of the said decree. This application was made on the 18th September 1950 and the learned Munsif by his judgment dated the 29th June 1951 dismissed the same on the ground that the applicant was not a "thika tenant" under the Act. The basis of that finding was that the applicant had failed to prove the "thika system" as required by law. The appeal from that decision was dismissed by the lower appellate court on the 8th February 1952. The learned Subordinate Judge held that the learned Munsif's decision was not appealable in law. He also held that the decision of the learned Munsif was right on the merits and the "thika system" not having been proved, the applicant was not a "thika tenant" under the Act and the application could not, therefore, succeed.

There can be no question that under the law, as it then stood, vide *Haran Chandra Dey* v. *Sm. Charu Bala Dassi* (1), *Murari Mohan Mukherjee* v. *Prokash Chandra Chatterjee* (2), *Sm. Suraj Jan Bibee* v. *Banku Behari Saha* (3), *Shaikh Mohammed Mateen* v. *Baijnath Bajoria* (4), the decisions of the two courts below were right on the merits and, if the law had remained as it was, there would have been no scope or occasion for any interference by this Court. The relevant statute, however, has undergone some quick changes in the meantime, the effect whereof requires to be considered in the present case.

The appeal to this Court was filed on the 18th March, 1952, and the alternative revisional application on the 19th. While they remained pending the Calcutta Thika Tenancy Act 1949 was amended first by the Amending Ordinance of 1952 and then again by the Amending Act of 1953, and the question is whether in view of these changes of the statute law the appellant has become entitled to any relief.

(1) (1948) 53 C.W.N. 553
(2) (1949) 53 C.W.N. 640.
(3) (1949) 54 C.W.N 281.
(4) (1949) 54 C.W N. 287.

Mr. Sen argues that under section 5(1) of the Ordinance of 1952, read with the amended definition of "thika tenant" which came along with it, the appellant became entitled to relief under section 28 of the Act of 1949 and his right in that behalf was not affected by the repeal or omission of the said section or sections by the Amending Act of 1953. He, accordingly, contends that the rejection of his client's application by the two courts below should be set aside.

On the other hand, the respondents contend that, whatever might have been the position under the Ordinance, the subsequent Amending Act of 1953, by providing in section 8 that section 28 of the Old Act of 1949 "shall be omitted," has struck at the root of the appellant's claim and, further, that the application must also fail on the ground that the applicant had no *locus standi* to make the same because of the transfer of his entire interest in the disputed holding sometime before the filing of the said application.

I shall take up first the respondent's second objection which relates to the question of *locus standi*. The application, as I have already said, was made on the 18th September, 1950, but, prior to that, the applicant had transferred his entire interest in the disputed holding to one Kumari Dassi by a kobala, dated the 5th May, 1950, and registered on the 12th August, 1950. It is, accordingly urged that, on the day, he applied under section 28 of the Act, he had no interest in the disputed holding and had thus no *locus standi* to make the said application which must necessarily, therefore, fail.

In considering this question of *locus standi* it must be remembered at the outset that the statute in its relevant part merely provides:

> "Where any decree . . . . . for the recovery of possession of any holding from a thika tenant has been made before the commencement of this Act but the possession of such holding has not been recovered from the thika tenant by the execution of such decree . . . . . the Court by which the decree . . . . . was made may, if it is of opinion that the decree . . . . . is not in

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confirmity with any provision of this Act other than sub-section (1) of section 5 or section 27, rescined the decree . . . . . ."

Prima facie, the statutory requirements underlined above are satisfied in this case and there is nothing in the statutory language to make the section quoted inapplicable merely because the tenant has transferred the holding. Remembering this, I proceed to consider the respondents' argument and it seems to me that, on general principles and in the context of the particular statute, as set out above, there are two obvious answers to that argument.

It is true that the applicant had transferred the disputed holding before the filing of the application but it cannot be denied that he was under the liability to make good transfer and in default to suffer damages. He had also liabilities under the decree e.g., for costs. It thus appears to me that notwithstanding the transfer of the holding he had sufficient interest to entitle him to apply under section 28 of the Act for rescission of the decree in question.

It seems to me further that under section 28 of the Act the Court can act *suo motu* and no application is necessary to set it in motion. The appellant's application is, therefore in the nature of an information inviting the Court's attention to certain facts on which it may, if it thinks fit, take action under the section. In this view too no question of *locus standi* of the applicant appears to be material.

I, accordingly, overrule the second point, raised by the respondents.

On the other point too the decision must be against the respondents. It is true that they have the decision of Chunder J. *Jogial Chameria* v. *Atul Krishna Laha* (1), in their favour. But that decision has since been overruled by a Division Bench of this Court vide, *Deorajin Debi* v. *Satyadhan Ghosal* (2). In this latter case, it was held by Sen, J. and myself that in regard to proceedings, pending on the date of the 1952

(1) (1953) 57 C.W.N 566 (2) (1953) 58 C.W.N. 64

Ordinance, the rights acquired by a thika tenant under section 28 of the Thika Tenancy Act 1949 read with the said Amending Ordinance of 1952 had not been taken away by the Amending Act of 1953. We rejected the argument that there was the necessary contrary intention, as required by section 8 of the Bengal General Clauses Act, in the proviso to section 1(2) of this Amending Act which by section 8, omitted or repealed the old section 28. We gave two broad reasons for our view, viz. (1) that, properly read, the proviso, even on its own language, could not affect such proceedings under section 28 of the Act of 1949 adversely to a thika tenant; in other words the omission or repeal of the said section 28 of the old Act of 1949 by section 8 of the Amending Act of 1953 would not affect such proceedings which would not abate by reason of such repeal but would continue under the Act of 1949 as otherwise amended by the said Amending Act of 1953; and (2), that, in any event, in relation to the above proceedings the proviso would be ambiguous, that is, capable of two interpretations, one favouring the continuance of such proceedings and the other stifling them or causing them to abate and as the former was in consonance with the intention of the Amending Act it was preferable to the other possible construction and ought to be allowed to prevail. We definitely rejected the view that the proviso could be construed only as envisaging automatic abatement or extinction of all proceedings under section 28 of the old Act by reason of the omission or repeal of this latter section and we also pointed out that there was nothing in law to prevent us from ascertaining the intention of the Amending Act to resolve the statutory ambiguity or from giving effect to it in the construction of the said proviso.

I have heard nothing in this case which even tends to show that we were wrong on the earlier occasion or casts any doubt on the correctness of the view we then expressed. Speaking for myself, I have never claimed infallibility for my views and if a *prima facie* case is made out for reconsideration I shall never hesitate to lend my helping hand in the matter so that any error committed by me may be suitably rectified in accordance with law. In the annals of this court instances may be found where judges have reconsidered their views on particular points of law once they felt convinced that the matter required further consideration. On occasions they have superseded their own earlier views and overruled themselves. That tradition is worth emulat-

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ing and never consciously would I allow it to suffer in my hands. If, therefore, I had felt any doubt as to the correctness of our decision in the case of *Deorajin Debi* v. *Satyadhan Ghosal* (1), I would have referred this case to the Division Bench either to have a re-affirmation of our view by another Bench of this Court or to have it reversed and the point finally settled by a Full Bench. I have however, as I have already said above, no reason to doubt the correctness of that decision. I, accordingly, overrule the respondents' second contention.

It was not disputed before me that in view of the Amending Act of 1953, the appellant was a "thika tenant." The respondents' decree for ejectment was, therefore, a decree for recovery of possession against a thika tenant as contemplated in section 28 of the Act of 1949. Admittedly also, the decree was made before the commencement of the said Act and possession had not been recovered from the "thika tenant" in execution thereof. That being so, the Court by which the decree was made may, if it is of opinion that the decree was not in conformity with any provision of the Calcutta Thika Tenancy Act other than sub-section (1) of section (5) or section 27, rescind the decree and that question has now to be considered. It is inevitable, therefore, that this case should go back to the trial court for a determination of the said question and a final decision on such determination in accordance with law.

While remanding the case, as above stated, I deem it necessary, in the circumstances of this case, to give one or two general directions. Under section 28 the Court has a discretion in the matter of rescinding a decree. This is indicated by the use of the word "may" by the Legislature. I do not think that that word can properly be construed as "shall" having regard to the scheme and structure of the section and the context in which the word "may" has been used. No doubt the discretion of the Court has to be exercised judicially after taking into consideration all the relevant circumstances but there is no element of compulsion in it. In dealing with this case on remand the trial Court will have regard to this aspect of the matter. In exercising its discretion under section 28 of the Act the Court will also take into consideration the legal effect of the transfer made

(1) (1953) 58 C.W.N. 64.

by the Appellant in favour of Kumar Dassi in the light of section 6(e) of the Transfer Property Act and for the purpose it will add the said transferee as a party to the present proceedings and if she so desire allow her to become a co-applicant so that the rights of the different parties in regard to the disputed property may be settled once for all and put on a sure and firm footing.

I, accordingly, allow this appeal in part, set aside the orders of the two Courts below and send back the case to the trial court for a final decision in accordance with law in the light of the directions given by me and the observations I have made above.

In the circumstances of this case, I direct that the parties will bear their own costs in this Court as also in the two courts below.

In view of the order passed in the Appeal, no order is necessary on the alternative application under section 115 of the Code of Civil Procedure.

S.C. *Appeal allowed in part. Case remanded.*

ORIGINAL CIVIL.

Before Mr. Justice P. B. Mukharji.

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February, 26.

IN THE GOODS OF NANDA LAL SETT, DECEASED.*

Will—Probate—Caveat—High Court Original Side Rules, Chapter 35 Rule 27—Affidavit in support of caveat must disclose the legal grounds of objection to the grant of the probate—Probate proceedings, what is decided in—Caveat, its nature—Questions of title, if can be gone into in probate proceedings.

Under Rule 25 of Chapter 35 of the Original Side Rules, the caveat must be supported, within 8 days of the lodging of the caveat, by an affidavit which shall first state the right and interest of the caveator and secondly the ground of the objections to the application for the grant of probate

The only questions germane for the Court to consider at the time of making the grant of the probate of a Will are questions relating the (1) testamentary capacity of and (2) due execution by the testator i.e. (1) physical and mental capacity such as *inter alia* appreciation of what is being done, sanity, duress, undue influence, fraud and (2) such considerations *inter alia* as signature or thumb impression to the Will, its proper execution and attestation.

A caveat is not a notice to any particular person nor does it commence litigation nor institute proceedings but is a notice to Court.

Durga Pada Bera v. *Atul Chandra Bera* (1) referred to.

A probate is in the nature of a certificate of the Court stating that the last Will of the testator has been proved and that the person who is granted the probate usually the executor of the Will, shall administer the property and credits of the deceased concerning the Will and it neither settles construction of the provisions in the Will nor does decide questions of title to the properties covered by the Will.

Kasi Bai v. *Gobinda Lal Macker* (2) approved.

Application for discharge of a caveat to the Will filed by the executrix Sm. Basana Dutt.

* Suit No. 457 of 1953.

* Application in *re*: Suit No. 457 of 1953.

(1) [1938] I.L.R. 2 Cal. 75.

(2) [1949] I.L.R. 2 Cal. 88.

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The material facts will appear from the judgment.

S. Majumdar for the Applicant.

S. N. Gorai for the Respondent.

The judgment of the Court was as follows:—

P. B. Mukharji, J.:—This is an application for the discharge of a caveat to the Will of Nandalal Sett, deceased, under Ch. 35 Rule 27 of the Original Side Rules of this Court. The application is made by Sm. Basana Dutt, the sole executrix and trustee of the last Will of Nandalal Sett deceased, dated the 26th December, 1952. The applicant applied to this Court on the 15th December, 1953 for the grant to her of the probate of the Will of Nandalal Sett. The caveator is Gobinda Lal Sett, a brother's son of the deceased testator who filed his affidavit in support of his caveat on the 2nd January, 1954.

The reason why the caveat is sought to be discharged is that the affidavit in support of the caveat does not disclose legal grounds of objections to the grant of probate.

Under Rule 25 of Chapter 35 of the Original Side Rules the caveat requires to be supported, within eight days of the lodging of the caveat, by an affidavit which shall state first the right and interest of the caveator and secondly, the grounds of the objections to the application for the grant of probate. The caveator in his affidavit has disclosed his right and interest as an heir of the testator Nandalal Sett. But the other requirement of Rule 25 of Ch. 35 of the Original Side Rules about the grounds of the objections to the grant of probate is, it is contended, not satisfied by the affidavit in support of the caveat. The only ground shown is in paragraph 9 of the affidavit of Gobinda Lal Sett in support of the caveat affirmed on the 2nd January, 1954. The ground is taken in these terms:—

> "In the circumstances aforesaid and in the interest of justice, I submit that the probate should not be granted to the said Sm. Basana Dutt in respect of the trust fund and/or properties declared and created by Prosanna Kumar Sett in his Will, dated the 11th November, 1913, but the same should be granted to me as heir of Prosanna Kumar Sett."

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To appreciate this objection a brief account of the family history is essential. Prosanna Kumar Sett, a predeceased brother of the testator Nandalal Sett, had made his Will on the 11th November, 1913, the probate of which was granted on the 25th April, 1917 to the widow of Prosanna as the executrix and sole beneficiary thereunder. Prosanna by his Will created a trust of his residuary properties for certain charities with power to her to appoint a trustee. She died without appointing a trustee and the testator Nandalal Sett, as the sole surviving brother and reversionary heir, applied for and obtained from this Court Letters of Administration *de bonis non* in respect of Prasanna's estate. The testator Nandalal Sett by his Will appointed the applicant as the trustee of the trust fund created by Prosanna. The testator claimed to do so by virtue of his position as Administrator de bonis non and in fact, the testator says in his Will "as such Administrator as aforesaid, I am now the sole trustee of the said charitable trust and competent to appoint a trustee to succeed me in that office on my death." The testator Nandalal Sett by his Will appointed the applicant, his grand daughter, not only the sole executrix of his estate but also appointed the applicant by clause 11 of his Will the trustee of Prosanna's Will, dated the 15th November, 1913.

According to the affidavit in support of the caveat the caveator Gobinda Lal Sett's case in that in the Will of Prosanna Kumar Sett, dated the 11th November, 1913 no provision was made for the appointment of a trustee or trustees and therefore, the testator Nandalal Sett had no power or authority, express or implied, to nominate and appoint or constitute a trustee or trustees and in any event any such appointment or nomination by the testator Nandalal Sett in his Will dated the 26th December, 1952, is in contravention of the trust declared by Prosanna and as such bad, illegal, inoperative and of no effect. In fact, the allegation is made that the testator Nandalal Sett, deceased, committed a breach of Prasanna's trust by appointing the applicant a trustee of the trust fund created by Prasanna's Will.

In my opinion the whole of this affidavit in support of the caveat misconceives entirely the scope and function of an affidavit in support of the caveat required by the Rules of this Court to state "the grounds of the objections." The present appli-

cation is for probate of the Will of Nandalal Sett, dated the 26th July, 1952. The grounds of objection in support of a caveat against this Will have to disclose materials to show that probate should not be granted to this Will. In other words, such an affidavit to support a caveat has to show that that Will was not duly or lawfully executed as a Will. The only questions germane for the Court to consider at the time of making a grant of the probate of a Will are questions relating to the testamentary capacity of the testator whose Will has to be probated and the due execution of that Will by the testator. Questions of testamentary capacity will obviously cover considerations of physical and mental capacity such as *inter alia* appreciation of what is being done, sanity, duress, undue influence, fraud, and questions of due execution will include *inter alia* such considerations as signature or thumb impression of the testator to the Will, its proper execution and attestation. They are grounds of objection to the grant of probate.

A caveat is simply a warning given by a person having or asserting an interest in the estate of the deceased against the Court issuing any probate without notice to the caveator. It is essential to observe here that a caveat is not a notice to any particular person but is a notice to the Court not to allow proceedings to be taken in the matter of the Will of the deceased without notice to the caveator. It does not commence litigation nor does it institute proceedings. The whole object of the caveat is to prevent the issue of any grant without notice to the caveator. The main purposes for which a caveat is entered are to give time to the caveator to make enquiries and to obtain such information as may enable him to determine whether or not there are grounds for his opposing the grant or to give him an opportunity of raising any question arising in respect of the grant of probate or to enable the caveator to apply for an order that the sureties to the administration bond shall justify or as a step preliminary to an action or to the issuing of citation. That is how the learned Editors of the 19th Edition of Tristram & Coote's Probate Practice state the law at page 387. The form of a caveat under the Indian Succession Act as provided in Schedule 5 thereof under Section 284(4) of that Statute or the form of the caveat in the High Court as provided in Form 12 under Rule 24 of Chapter 35 make it abundantly clear that a

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caveat is nothing more than a warning. The form of the caveat either under the Indian Succession Act or under the Rules of the High Court does not stipulate that grounds of objection should be stated in the caveat. Under the procedure laid down in the Indian Succession Act nothing follows upon the filing of a caveat except that the caveator becomes entitled to notice before the grant, the object being that he gets an opportunity to appear and contest the grant.

There is no procedure under the Indian Succession Act requiring an affidavit in support of the caveat to disclose the grounds of objection to the grant. This is where the procedure relating to grant of probate in this High Court is different from that under Indian Succession Act. Under the Rules of the Original Side of the High Court the caveator has to file an affidavit which must not only disclose his right and interest in the estate of the deceased testator, but also the grounds of objection. The penalty for not making the requisite affidavit within the time specified by the rules is discharge of the caveat itself. If a proper affidavit disclosing the right and interest of the caveator as well as the grounds of objection to the grant is made in support of the caveat within the time laid down, then the next stage is reached by marking the matter as a "contentious cause" where the petition for probate is regarded as a plaint and the affidavit of the caveator as written statement and the "contentious cause" is thereafter heard as a suit. The matter comes up before me before the stage of being a contentious cause. It is said that before it is marked as a contentious cause, the caveat should be discharged on the grounds that I have already stated.

"What is attempted to be done in this case is not to say that the testator had no testamentary capacity to make the Will or that in fact it was not duly executed, but only that a particular provision in the Will of Nandalal Sett cannot be given effect to as being in breach of trust created by Prosanna. That is the only ground disclosed in the affidavit in support of the caveat. It is not, in my view, a ground of objection at all to the grant of probate of the Will of the testator Nandalal Sett. It is at best an objection about the construction of that provision in the

Will of the testator, Nandalal Sett, and its effect. That is not a ground on which the probate of this Will can be refused.

Mr. Majumdar has relied on the decision in *Durga Pada Bera* v. *Atul Chandra Bera* (1). That is a Bench decision of this Court where the well-known principle is laid down that the grant of probate is decisive only of the genuineness of the Will and of the right of the person to whom the grant is made to represent the estate. Such grant is no bar to the determination of any question of title or to a suit for construction of the Will. Misconception of what the probate of a Will means is frequently the cause of a good deal of confusion about the procedure in respect of probate. What is after all a probate of the Will? The probate of a Will is in the nature of a certificate of the Court stating first that the last Will of the testator has been proved before the Court and secondly, that the administration of the property and credits of the deceased and in any way concerning his Will is granted to a particular individual, usually the executor in the Will, coupled with a record of an undertaking by such grantee of the probate to administer the estate and to make a full and true inventory of the property and credits of the deceased and exhibit the same in Court within six months from the date of the grant or within such further time as the Court may from time to time appoint and also to render to the Court a true account of such property and credits within one year from such date or within such further time as the Court may from time to time appoint. The probate does nothing more. It neither settles construction of the provisions contained in the Will nor decides questions of title to the properties covered by the Will. A very recent decision on the Original Side of this Court is *Kasi Bai* v. *Gobinda Lal Macker* (2), says after a review of authorities, both English and Indian, that in probate proceedings it is completely outside the province of a court to determine any question of title to the properties covered by the Will or to construe the provisions of the document sought to be probated except for the limited purpose of determining its dispositive effect.

(1) [1938] I.L.R. 1 Calc. 75.

(2) [1949] I.L.R. 1 Calc. 88.

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Therefore, in that view of the law, the opposition on behalf of the caveator that the interest of the trust fund created by the Will of Prosanna will be in jeopardy cannot be sustained as a ground for refusing the probate of Nandalal's Will, nor the contention that the testator had no power to appoint a trustee can be regarded as at all a relevant question at this stage in deciding whether probate should be granted or not to the Will of the testator Nandalal Sett. The caveator's interest, if any, is not in danger by the grant of this probate. He has every remedy either by way of a construction of the Will in question or by way of a suit or any other appropriate proceedings to protect the estate of Prosanna Kumar Sett which he is supposed to be anxious to do. But that is no reason why this Court should not grant probate of the Will of Nandalal Sett, which is the only question before the Court on this application at this stage.

For these reasons I am satisfied that the affidavit filed in support of the caveat in this case does not meet the requirements of Rule 25 of Chapter 35 of the Original Side Rules of this Court in so far as it has failed to disclose "grounds of the objections to the application." Such affidavit is, therefore, not in compliance with Rule 25 of Chapter 35 of the Original Side Rules. The consequence of the caveator's failure to file an affidavit in compliance with Rule 25 is discharge of the caveat itself as provided in Rule 27 of Chapter 35 of the Original Side Rules.

There will, therefore, be an order discharging the caveat and granting probate of the Will of the deceased testator Nandalal Sett to the applicant. As the entire opposition on behalf of the respondent is misconceived in law, the respondent must pay the costs of this application which is certified for counsel.

B. Chatterjee: Solicitor for the Applicant.

B. N. Ghosh: Solicitor for the Respondent.

S.C. *Caveat discharged and Probate of Will granted with costs.*

APPELLATE CIVIL.

Before Mr. Phani Bhusan Chakravartti, Chief Justice and Mr. Justice S. R. Das Gupta.

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Workmen's Compensation Act (VIII of 1923), Sections 2(1) (n), 3(2), 3(3) and 3(4), Schedules II and III—Factories Act, 1934, Section 2, Clause (g)—Factories Act, 1948, Section 2 (k) (iv) and Section 120—The Repealing and Amending Act, 1950, Sections 3 and 4—General Clauses Act, 1897, Section 8.

The appellant was held to be a workman, being an employee in "manufacturing process" as defined in the Factories Act of 1948 distinguished from the Factories Act of 1934. Section 8 of the General Clauses Act was considered along with Section 120 of the Factories Act of 1948 and Sections 3 and 4 of the Repealing and Amending Act of 1950 in this connection.

The ordinary notion of an injury by accident is that it means physical harm caused to a workman by a sudden mishap which was not expected by him, but Section 3(2) of the Workmen's Compensation Act extends the term to certain diseases as well. The relevant diseases are set out in Schedule III where they are specified as peculiar, respectively, to certain types of employment. Section 3(2) in substance also provides that, if a workman is employed in the performance of certain kinds of duty and he contracts a disease which is specified in Schedule III as peculiar to such employment, he will not be required to prove by evidence that he has suffered an injury by accident arising out of and in the course of his employment, but an injury by accident shall be presumed and it shall also be presumed to have arisen out of and in the course of the workman's employment, although the latter presumption is rebuttable by the employer. What sub-sections (2) and (4) of Section 3, read together, mean appears to be that, if a workman claims compensation on the basis of an occupational disease, he can succeed and get the benefit of the presumption provided for in Section 3(2) only if the disease is one of those mentioned in Schedule III and is connected with his employment in the manner therein indicated. But, if he cannot bring himself under Section 3(2) and the Schedule, he must prove affirmatively some wound or injury and also that such wound or injury led to the disease as a consequence.

"Process" is a continuous and regular action or succession of actions taking place or carried on in a definite manner. It is not one of the re-

* Appeal from Original Order 14 of 1953 against the Order of M. N. Gan, Esq., Commissioner for Workmen's Compensation, West Bengal in Claim Case No. 575 of 1950 dated the 16th of September, 1952.

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quisites that the activity contemplated by the word 'process' should involve some operation on some material in order to its conversion to some particular state. The word 'process' thus does not exclude its application to handling. If an employment consists not merely in the handling of lead but in handling involving the use of lead or any of its preparations, such use being any kind of use, it must be held to be an employment within Schedule III.

Appeal by the Applicant (workman).

Application for Compensation by a workman under the Workmen's Compensation Act.

The material facts will appear from the judgment.

Nalin Kanta Mukherji with Jnan Chandra Roy for the Appellant.

Binayak Nath Banerjee with Anil Kumar Sen for Dwijendra Nath Mukherjee for the Respondent.

The judgment of Court was as follows:—

Chakravartti, C.J.:—This appeal involves a question of first impression under the Workmen's Compensation Act which is a pure question of law, arising out of facts now accepted by both parties. The facts are as follows.

The appellant, Khuda Bux, was employed for a long time in a printing press kept by the respondent, first under a contractor and then since October, 1948, directly. After putting in over forty years of service, he found himself a total wreck and unable to work any longer. He first absented himself from on the 26th of January, 1950 and did not rejoin. The capacity in which he worked in the press was that of an impositor and his duties were that after the matters to be printed had been set in type on a linotype machine, he took the types and arranged them so as to make up a form and then fixed them up in a frame or chest. It has been found that he is suffering from chronic lead poisoning and it has also been found that he contracted the disease by having had to handle lead in the course of his employment. The disability which the disease has brought on him is permanent and total. During his employment, his wages were Rs. 60/- to Rs. 70/- per month.

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On the 26th August, 1950, the appellant applied for compensation under the Workmen's Compensation Act for personal injury by accident. The application did not state under what section of the Act it was made but it was clear from the nature of the application that the appellant was making a case under Section 3(2) of the Act and that he was pleading an occupational disease specified as peculiar to his employment in Part B of Schedule III.

The Commissioner has found that the appellant was a workman within the meaning of Section 2(1), (n), of the Act, read with Clause (ii) of Schedule II. Yet and in spite of finding that the appellant had suffered the personal injury of lead poisoning arising out of and in the course of his employment, he has dismissed the claim in the view that in Schedule III of the Act, the disease of lead poisoning had been specified as peculiar only to employments which were processes involving the use of lead, but not also employments which consisted in the mere handling of lead. In the Commissioner's view, the Schedule made a clear distinction between handling and process and since the appellant's employment could not be called a process, he was not entitled to succeed under section 3(2). The appellant did not accept that decision and has preferred the present appeal.

The principal question involved in the appeal thus is whether on the true construction of the relevant entry in Schedule III, the view taken by the Commissioner was right. But before taking up that question, a point raised by the respondent, which was not taken in the Court below, may be disposed of.

It was contended that the appellant was not even a workman and that the Commissioner had found him to be one, by wrongly applying the definition of 'manufacturing process' as contained in the Factories Act of 1948, whereas it was the definition in the Act of 1934 which ought to have been applied. Clause (ii) of Schedule II of the Workmen's Compensation Act, to quote only the material part, defines 'workman' as a person 'employed in any premises where in * * * on any one day of the preceding twelve months, ten or more persons have been employed in any manufacturing process, as defined in

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clause (G) of section 2 of the Factories Act, 1934." It was contended that the definition of "manufacturing process" in the Factories Act of 1934 did not contain clause (IV) of the present definition which speaks of "printing by letterpress, lithography, photogravure or other similar work," and therefore the appellant, who worked in a printing press, could not be said to have been employed at a place where a 'manufacturing process' within the meaning of the Factories Act of 1934 was carried on. He was, therefore, not entitled to be regarded as a workman.

In my opinion, this contention is plainly unsound. The Factories Act of 1934 was repealed and re-enacted by the Act of 1948 and therefore by virtue of Section 8 of the General Clauses Act, references in the Workmen's Compensation Act to the Act of 1934 must be construed as references to the Act of 1948. There is nothing from which a different intention appears. Had the Workmen's Compensation Act been amended after 1948 and had the reference to the Act of 1934 yet remained, there would be reason for saying that it was the Act of 1934 which was intended to be regarded, but there has been no amendment of the Workmen's Compensation Act after the Factories Act of 1948, nor is there any other indication that the new Act is not to be read for the old as required by Section 8 of the General Clauses Act.

As against these considerations, it was urged that the Factories Act of 1948 was not repealing and amending Act, but was an Act to consolidate and amend the law relating to labour in factories as the preamble showed, and consequently, section 8 of the General Clauses Act could not apply. That argument was founded on a misconception. Section 8 of the General Clauses Act does not require that the later Act, repealing and re-enacting an earlier Act, should be a repealing and amending Act. All that it requires is that a Central Act should repeal and re-enact a former enactment. To that it was replied that even the repeal of the Factories Act of 1934 had now disappeared because the repeal was effected by section 120 of the Act of 1948, read with a table of enactments therein set out, but by the Repealing and Amending Act of 1950 the table of repealed enactments had itself been repealed. With the table gone, the operative words of section 120 of the Act of 1948 had been left without any

content and the Act had been reduced to a purely consolidating and amending Act, repealing nothing. The Act of 1934 could no longer be said to have been repealed or, in any event, the Act of 1948 could no longer be said to have repealed and re-enacted it.

This contention was based, in my view, on a mistaken notion of the scope and effect of a repealing and amending Act. Such Acts have no legislative effect, but are designed for editorial revision being intended only to excise dead matter from the statute book and to reduce its volume. Mostly, they expurgate amending Acts, because having imparted the amendments to the main Act, those Acts have served their prupose and have no further reason for their existence. At time, inconsistences are also removed by repealing and amending Acts. The only object of such Acts which, in England are called Statute Law Revision Acts, is legislative spring cleaning and they are not intended to make any change in the law. Even so, they are guarded by saving clauses drawn with elaborate care, of which section 4 of the Repealing and Amending Act of 1950 is itself an apt illustration. Besides providing for other savings, that section says that the Act shall not affect "any principle or rule of law * * * notwithstanding that the same may have been * * * derived by in, or from any enactment hereby repealed." The principle of law derived from the repeal by section 120 of the Factories Act of 1948 of the Act of 1934, namely, that references in other Acts to the Act of 1934 should be read as references to the Act of 1948, is thus not affected by the Repealing and Amending Act of 1950 which repealed the operative part of section 120 of the Act of 1948. From another principle also the same result follows. The repeal of the repealing section of the 1948 Act could not have the effect of reviving the Act of 1934, repealed thereby, and, consequently, since the repeal of the Act of 1934 continued to subsist, section 8 of the General Clauses Act continued to apply. The Commissioner was therefore right in applying the definition of 'manufacturing process' contained in the Factories Act of 1948 and also right in holding on the basis of that definition that the appellant was a workman.

Proceeding now to the principal question in the appeal, its decision rests upon the true construction of section 3(2) of the

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Workmen's Compensation Act, read with the first entry in the righthand column of Part B of Schedule III.

It will be useful to see first, and broadly what the two provisions do. Broadly speaking, section 3(2) enlarges the concept of an injury by accident and gives the workman the benefit of a presumption. It provides as follows:—

> "If a workman employed in any employment specified in part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment, or if a workman, whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months in any employment specified in Part B of Schedule III, contract any disease specified therein as an occupational disease peculiar to that employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this section and, unless the employer proves the contrary, the accident shall be deemed to have arisen out of and in the course of the employment in the same kind of employment."

The ordinary notion of an injury by accident is that it means physical harm caused to a workman by a sudden mishap which was not expected by him, but section 3(2) extends the term to certain diseases as well. The relevant diseases are set out in Schedule III where they are specified as peculiar, respectively, to certain types of employment. Section 3(2) in substance also provides that if a workman is employed in the performance of certain kinds of duty and he contracts a disease which is specified in Schedule III as peculiar to such employment, he will not be required to prove by evidence that he has suffered an injury by accident arising out of and in the course of his employment, but an injury by accident shall be presumed and it shall also be presumed to have arisen out of and in the course of the workman's employment, although the latter presumption is rebuttable by the employer. So read the section would appear to lay down only a rule of evidence and had there been no other provision in the Act, it might have been thought that even if the workman's case did not come under section 3(2),

the only result would be that he would lose the benefit of the presumption, but he would not be debarred from proving by evidence that his disease was an injury by accident and that it had arisen out of and in the course of his employment. Sub-section (4) of section 3, however, abridges that liberty very considerably, for it says that in cases outside sub-sections (2) and (3) the workman cannot claim compensation for a disease, unless he proves a specific injury by accident and also proves the disease to have arisen out of it. What the two sub-sections, read together, mean appears to be that, if a workman claims compensation on the basis of an occupational disease, he can succeed and get the benefit of the presumption provided for in section 3(2) only if the disease is one of those mentioned in Schedule III and is connected with his employment in the manner therein indicated. But, if he cannot bring himself under section 3(2) and the Schedule, he must prove affirmatively some wound or injury and also that such wound or injury led to the disease as a consequence. In such cases a disease caused by slow absorption of some noxious matter or by general pressure on the physical system but not originating in a specific wound or injury, would appear to be excluded. It is important to point out this limitation contained in sub-section (4), because besides making a case under section 3(2), the appellant did not make any attempt to prove any specific injury. If his case under section 3(2) is not established, he must fail.

Turning now to Schedule, it is divided into two parts, A and B. Part A is concerned with cases for which employment for no particular period is required, but part B requires that the workman should have been employed for a continuous period of not less than six months in the employment concerned. Both the parts specify employments which involve contact with injurious substance or exposure to certain conditions as incidents of the workman's duties and they specify diseases which are caused by slow and gradual absorption of offensive matter or by a general pressure on the physical system of the workman.

The appellant has proved that he is a workman and also that he had been employed as an impositor for more than six months under the respondent. The disease from which he is suffering is chronic lead poisoning. The only entry is Schedule

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III which is applicable to his case is the first entry in Part B which describes the employment concerned as "any process involving the use of lead or any of its preparation or compounds." I am leaving out the portion which is not material. The Commissioner has held that the appellant's employment does not come under that description, because the Schedule makes a clear distinction between 'process' and 'handling' and because the appellant's employment, although it might consist in the handling of lead, did not constitute a process. Besides pointing out the mention of process and handling in the Schedule itself as what he considered to be different employments, the Commissioner has also relied upon the circumstance that the English Act originally contained an entry in exactly the same language as the entry in the Indian Act, but subsequently, another entry reading "handling of lead or its preparations or compounds" has been added in exercise of the power conferred by a provision corresponding to section 3(3) of the Indian Act. In the Commissioner's view it was clear that 'process' was not synonymous with 'handling,' and he thought that the difference between the two was pointedly illustrated by the necessity felt in England for the subsequent addition of "handling."

Section 3(2) of the Indian Act speaks of "a workman employed in any employment" specified in part A or Part B of Schedule III. The heading in the second column of the Schedule is 'Employment' and different kinds of employment are set out below, each against a particular disease. Among the employments specified in the column, there are several which are described as "any process." It is thus clear that in the language of the Schedule, a process is an employment. There is, however, one entry which reads as "Handling benzene * * * and any process * * * involving the use of benzene." From that entry if it is taken by itself, it may undoubtedly be said that handling is also an employment and it is something different from process. I shall deal with this argument presently, but I may point out at this stage that the argument drawn by the Commissioner from the English Act is not in any way convincing. The language of the relevant section of the English Act, section 44(1), is any workman "employed in any process," mentioned in the Third Schedule and the heading in the second column of the Schedule is "Description

of processes." It is thus clear that although in the body of the English Schedule 'process' and 'handling' have been separately mentioned, yet even as to the disease of lead-poisoning handling is also a process under the language of the general heading of the Second column of the Schedule.

On behalf of the respondent it was contended that the natural meaning of the word 'process' made it something different from 'handling,' and it was said that a process meant "a mode of treatment of certain materials in order to produce a given result, a species of activity performed on the subject-matter in order to transform or reduce it to a certain state." It was accordingly contended that in order that an employment involving contact with lead might be a process it was necessary that some operation should be performed on the metal in order to bring it to a certain shape or condition. That contention does not appear to me to be acceptable. According to the Oxford Dictionary, one of the meanings of the word 'process' is "a continuous and regular action or succession of actions taking place or carried on in a definite manner, and leading to the accomplishment of some result." The activity contemplated by that definition is perfectly general, requiring only the continuousness or quick succession, but it is not one of the requisites that the activity should involve some operation on some material in order to its conversion to some particular state. There is thus nothing in the natural meaning of the word 'process' to exclude its application to handling.

Indeed, the Schedule itself makes it clear that process and handling are not mutually exclusive. The last entry in the lefthand column of the Third Schedule is "Any process involving the handling or use of tar," from which it appears that a 'process' may consist in handling or, at least, handling may be a part of a process. To my mind, the real contrast in the Schedule is not between process and handling but between handling a material and the process involving the use of the same material.

In other words, there may be a process which consists only in handling and there may be a process which involves not handling or not merely handling but use or also use. That

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appears clearly from the entry as to benzene which I have already read, namely "handling benzene * * * or any process involving the use of benzene," and also from the last entry, reading "any process involving the handling or use of tar." The entry as to lead with which we are concerned in the present case reads, as already stated as "any process involving the use of lead." The question, therefore, is whether the appellant's employment was such that it consisted only in the handling of lead or whether it also involved the use of lead.

On behalf of the respondent it was contended that the appellant's employment might be a process involving the handling of lead, but it was not a process involving the use of lead. 'Use,' it was said, meant utilisation. I am unable to agree, because the natural connotation of the word 'use' is a perfectly general one and also because where the Legislature intended to refer to utilisation in the Schedule, it has used that very word. One of the entries in the Schedule is "any process involving the production, liberation or utilisation of arsenic." In construing the language of the Schedule, one cannot therefore equate 'use' with 'utilisation.' It follows that if an employment consists not merely in the handling of lead, but in handling involving the use of lead or any of its preparations, such use being any kind of use, it must be held to be an employment within the Schedule.

The duties of the appellant have already been mentioned. After the matters to be printed have been set in type on a linotype machine, he took the types, arranged them in a proper order so as to make up a form and then fixed them up in a frame or a chest. Anyone familiar with a linotype machine knows that it throws out lead bars, each one of the length of the intended line, on which letters have been imprinted and it is these bars which have to be arranged in a proper order in order to make a page of intelligible reading matter. In my view in so arranging the bars and fixing them up in a chest, an impositor does not merely handle lead, but carries out an intelligent operation, in the performance of which lead or preparations of lead are used. 'Handling' as contemplated by the Indian

Schedule, and, I conceive, as also contemplated by the English Schedule, is mere handling, involving no use of the material concerned such as a menial servant might be engaged in, if he were employed to carry the bars to the press. The employment of the appellant in the present case was far different and, as I have already explained, although it consisted in part in handling, the handling was such that it involved use. In my view, therefore, the Commissioner was not right in holding that the appellant had failed to bring himself within section 3(2), read with Schedule III of the Act. It has been stated by the Commissioner that the wages of the appellant were admitted to have been Rs. 60/- to Rs. 70/- per month. We are informed that on the basis of that rate of wages, the proper amount of compensation would be Rs. 2,940/-.

In the result, the appeal succeeds. The judgment and order of the Commissioner are set aside and the appellant's application for compensation is allowed. There will be an order for payment to him by the respondent as compensation of a sum of Rs. 2,940/- with the costs of this appeal the hearing fee of which we assesss at three gold mohurs.

In view of the difficulty of the point, we would not make any order for costs of the trial Court.

S. R. Das Gupta, J.—I agree.

P.K.D. *Appeal allowed.*

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee.

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December, 18

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January, 7

ASTA BALA DASI

v.

BEJOY KUMAR DAS & ORS.*

Limitation Act, Articles 120 and 148—Bengal Tenancy Act, Section 26G (8) (a)—Civil Procedure Code, Order 1, Rule 10.

Article 148 and not Article 120 of the Limitation Act is applicable to a suit instituted by a mortgagor under Section 26G (8) (a) of the Bengal Tenancy Act for redemption and recovery of possession of the mortgaged property.

Where one of the plaintiffs died during the pendency of a suit and there was no substitution in his place within time, the court had ample power under Order 1, Rule 10(2), of the Code of Civil Procedure to add his heir and legal representative as a co-plaintiff, so long as the claim was not barred by limitation.

Appeal by the Defendant.

Appeal from a decree passed in a suit under Section 26G Sub-section (8), Clause (a), of the Bengal Tenancy Act.

The material facts will appear from the judgment.

Amaresh Chandra Roy and Prafullya Kumar Roy (Jr.) for the Appellant.

Panchanan Pal and Amiya Kumar Chatterjee for the Respondents.

C.A.V.

The judgement of the Court was as follows:—

P. N. Mookerjee, J.:—The principal point—or I would rather say the only point—which requires consideration in this

* Appeal from Appellate Decree No 532 of 1953 against the decree of Sri S. C. Dutta, Additional District Judge, Murshidabad at Berhampore in Title Appeal No. 57 of 1952, dated the 4th of November, 1952, affirming the decree of Sri J. C. Chakravortty, Munsif, 1st Court, Berhampore, dated the 27th of March, 1952.

appeal is whether a suit by the mortgagor under Section 26G. Sub-section (8), clause (a), of the Bengal Tenancy Act is governed by Article 148 of the Indian Limitation Act. The question is not one of much difficulty but it is not wholly without importance.

On the 12th Chaitra, 1333 B.S. corresponding to 27th March 1927, the respondent No. 1 Bejoy Kumar Das and his uncle Natobar Das, the father and father-in-law, respectively, of Respondents Nos. 2 and 3, mortgaged by an appropriate registered instrument an occupancy raiyati holding to the appellant for securing a loan of Rs. 1,000/-. It was a composite mortgage combining in itself a mortgage by conditional sale and a usufructuary mortgage. Its relevant terms were that the mortgagee would possess the mortgaged property in lieu of interest and in default of repayment of the principal money within 11 years from the date of the mortgage bond the transaction would ripen into an absolute sale in favour of the mortgagee. It was thus an anomalous mortgage usually known as mortgage usufructuary by conditional sale or a mortgage by conditional sale with possession [vide in this connection the case of *Mahendra Nath Sardar* v. *Kalipada Haldar* (1)], and there is no dispute that the transaction was in substance a mortgage by conditional sale in which possession of the land had been delivered to the mortgagee as contemplated by sub-section (8) (a) of section 26G of the Bengal Tenancy Act.

The mortgagee remained in possession all along and after the introduction of the amended section 26G of the Bengal Tenancy Act the original mortgagor No. 1 Bejoy Kumar Das and the sons of the other mortgagor Natobor who had died in the meantime applied under section 26G sub-section (5) of the Bengal Tenancy Act for restoration of possession and other reliefs as provided in that sub-section and, having failed in their attempt because of the Full Bench decision of this Court in the case of *Badsha Mia* v. *Mobarak Ali Shonar* (2), where it was held that the said sub-section was not applicable to cases of such mortgages, they instituted the present suit on the 20th September 1950, for redemption or recovery of possession of the

(1) (1940) 44 C.W.N. 1009.
(2) (1946) 50 C.W.N. 578.

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mortgaged property under section 26G, Sub-section (8) (a) of the Bengal Tenancy Act. The suit has been decreed by the two courts below in a preliminary form under sub-section (9) of the said section 26G. Hence this second appeal by the defendant mortgagee.

In the written statement various defences were taken to the suit but the issues eventually framed and pressed were of a limited character. In the lower appellate court additional points were urged on behalf of the defendant appellant but without success and before me practically the question of limitation alone has been seriously pressed. At one stage of the hearing a question of defect of parties was also sought to be raised but eventually it was realised that it could only succeed if the defendant's contention as to the period of limitation for such a suit as the present was accepted and hence the attack was concentrated on the lower appellate court's finding that the suit was governed by Article 148 of the Indian Limitation Act.

Mr. Roy has argued that in a suit under section 26G, Sub-section (8) (a) of the Bengal Tenancy Act Article 148 of the Indian Limitation Act would not apply and that such a suit would be governed by Article 120 of the Act and as, according to him, the cause of action for the present suit arose, at the latest, even on the plaintiff's own case, on the expiry of 15 years from the date of the bond, i.e. on or about the 26th March, 1942, but the suit was instituted only on the 20th September, 1950, i.e. long beyond 6 years from the said accrual of the cause of action, it was barred under the said Article 120 of the Limitation Act. The point sought to be made was that the right of redemption or recovery of possession of the mortgaged property conferred by section 26G, was a special statutory right and the suit under sub-section (8) (a) of that section being a new remedy or a new type of action, provided by that special statute for enforcement of that special statutory right, Article 148 of the Limitation Act which provided the period of limitation for a suit for redemption under the general law would not apply and, there being no other Article in the Limitation Act which would specifically cover such a case, the residuary Article 120, applicable to suits, would determine the period of limitation. In support of his argument Mr. Roy relied on the decision of this

Court in the case of *Abinash Chandra Datta* v. *Gour Chandra* (1), which applied the relevant residuary Article 181 to an application under section 26G of the Bengal Tenancy Act.

I am unable to accept Mr. Roy's argument. Article 148 of the Indian Limitation Act is quite general in its terms. It provides a period of limitation of sixty years for a suit "to redeem or to recover possession of immovable property mortgaged," the limitation starting from the date "when the right to redeem or to recover possession accrues." Section 26G(8) (a) of the Bengal Tenancy Act (read with sub-sections 9, 10 and 11) under which the present suit has been brought authorises the institution of a suit for redemption or recovery of possession of the mortgaged property. It is clear from the wording of Article 148 of the Limitation Act that it applies to a suit for redemption as well as to a suit for recovery of possession of the mortgaged property. When the mortgage debt has already been paid off or extinguished the suit is for recovery of possession of the mortgaged property. It is, however, a suit to redeem—and this includes recovery or restoration of possession of the mortgaged property (vide clause (b) of section 60 of the Transfer of Property Act)—when something remains to be paid under the mortgage. Section 26G of the Bengal Tenancy Act in its sub-sections 8 to 11 contemplates both these types of cases (vide in particular sections 10 and 11). Upon the plain terms of the two statutes therefore the suit under sub-section (8) (a) of section 26G of the Bengal Tenancy Act is well covered by Article 148 of the Indian Limitation Act and I find no adequate reason to hold that such a suit is outside that Article. Section 26G of the Bengal Tenancy Act which confers this right of redemption or recovery of possession and authorises a suit for the enforcement of that right provides for no period of limitation for such a suit nor is any such provisions made by the special statute either in itself or by express reference to any other enactment. The case is thus left to be governed by the general law of limitation and as the suit is clearly one covered by the language of Article 148 of the Limitation Act the application of that Article cannot be resisted. If the Special Statute had prescribed a period of limitation or excluded Article 148 of the Limitation Act or if the language of that Article had not been wide enough to cover the suit different considerations might have arisen but, the

(1) [1952] A.I.R. Cal. 76.

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position being clearly otherwise, the case must be held to be governed by the Article, the residuary Article 120 not applying in the face of this specific Article. That being so, the appellant's contention must fail and her plea of limitation must be rejected.

As to the case cited on behalf of the appellant it is enough to say that there the residuary Article 181 was applied to the application under section 26G (5) of the Bengal Tenancy Act after holding that the said application was not covered by any other Article of the Limitation Act. In the present case I have already found that Article 148 applies and, that being so, there is no occasion to go to any other Article of the Limitation Act and there is no scope also for the application of the residuary Article 120 of the Act.

As I have rejected the appellant's argument on the question of limitation this appeal, as stated earlier, must fail. It is true that one of the plaintiffs (plaintiff No. 3) died during the pendency of the suit and there was no substitution in his place within time. The trial court, however, added his widow Jamuna Dassi (the present Respondent No. 3) who was his sole heiress and legal representative as a co-plaintiff in the suit. The suit was for redemption or recovery of possession of the mortgaged property and, in my opinion, the court had in the circumstances of the present case ample power under Order I Rule 10(2) of the Code of Civil Procedure to add the said legal representative of the deceased plaintiff. In view of my finding that Article 148 of the Limitation Act applies to suits under Section 26G, (8) (a) of the Bengal Tenancy Act, there can be no question that at the date when Jamuna Dassi was added to the suit as a co-plaintiff she and the other two plaintiffs fully retained their right of redemption or recovery of possession of the mortgaged property under the relevant provision of the said Section 26G and the addition of Jamuna Dassi, was therefore, a proper exercise of the Court's discretion under Order I, Rule 10(2) of the Code of Civil procedure. This has also not been seriously disputed by the appellant's learned Advocate.

In the above view of the matter, I dismiss this appeal but I direct that the parties will bear their own costs in this Court.

P.K.D. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee.

SURENDRA NATH MUKHERJEE.

v.

LILA MOHAN SINHA RAY.*

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1953.

December, 9 & 21.

Calcutta Rent Ordinance of 1946, Section 13—Ground of bonafide requirement not pressed at the hearing, effect of—Constructive resjudicata.

A permission to sue for ejectment obtained from the Rent Controller under the House Rent Control Order 1943 cannot be available for the purpose of a suit instituted on 1-8-1947 after the Calcutta Rent Ordinance of 1946 had come into force.

The question whether the expression "tenant in possession" in Section 13 of the Calcutta Rent Ordinance of 1946 includes a tenant who is in possession only through Sub-tenants, that is, a tenant who has wholly sublet the premises and whether a suit for ejectment of such tenant is maintainable in law without permission from the Rent Controller was left undecided.

If the suit be one where the permission of the Rent Controller is necessary under Section 13 of the Calcutta Rent Ordinance of 1946, the absence of such permission will vitiate the entire suit for ejectment and not merely the ground of bonafide requirement. The mere fact that the ground is not pressed at the hearing or that the suit may be decreed on other grounds will not alter the position or prevent the dismissal of the claim for ejectment.

Where the case came up before the High Court on a previous occasion after the suit had been dismissed by the courts below on the ground of non-maintainability owing to absence of permission from the Rent Controller, the plea in bar to the entertainment of the suit owing to absence of permission from the Rent Controller could and should have been agitated before the High Court. The said plea not having been agitated before the High Court on the previous occasion and the High Court having sent down the case for re-hearing in the view that the suit was maintainable, the plea is barred by the rule of constructive resjudicata and is not open between the parties.

Appeal from Appellate Decree No. 546 of 1953, against the decree of Sri B. K. Panda, Subordinate Judge, 2nd Court of Zillah 24-Parganas at Alipore in Title Appeal No. 851 of 1951 dated the 5th of November, 1952, reversing the decree of Sri A. P. Bhattacharjee, Munsif 1st Additional Court, Alipore, dated the 29th of June, 1951.

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Appeal by the Defendant.

Appeal from a decree passed in a suit for ejectment.

The material facts will appear from the judgment.

Nirmal Chandra Chakravorti with Birendra Nath Banerjee for the Appellant.

Radhika Charan Chatterjee with Anil Kumar Sett for the Respondent.

C.A.V.

The judgment of the Court was as follows:—

P. N. Mookerjee, J.:—Respondent No. 2, Abdul Monsur, was the owner of Premises No. 16, Chakraberia Road, North, and he let out the said Premises to Respondent No. 3 Abdul Hamid at a monthly rental of Rs. 35/-. In or about September, 1946, the tenant Abdul Hamid sublet the entire premises to the appellant Surendra Nath Mukherjee who is still in actual occupation of the same. On 8th August, 1944, the landlord Abdul Monsur duly gave to his tenant Abdul Hamid notice to quit asking him to vacate the premises with the end of August 1944, on the allegation that the premises were required by him bona-fide for his own use and occupation. The landlord Abdul Monsur applied for and obtained from the Rent Controller on 3rd August 1945 the necessary permission to sue for ejectment under the Calcutta House Rent Control Order 1943 which was then in force. No suit, however, was brought until 1st March, 1947. In the meantime the Rent Control Order of 1943 had expired and the Calcutta Rent Ordinance of 1946 had come into force on and from 1st October 1946 but the plaintiff Abdul Monsur did not take any fresh permission under this Ordinance and it was not also his case—as it could not be under the law that the permission, obtained under the Rent Control Order of 1943, would be available for the purposes of the present suit. The suit was contested by the sub-tenant defendant No. 2. Defendant No. 1 filed a written statement admitting his sub-letting of the entire premises to Defendant No. 2 and although he raised some other defences, he did not eventually appear at the trial.

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On the 9th September 1947, the plaintiff Abdul Monsur sold the disputed premises to the present respondent No. 1, Lila Mohan Singha Roy, who on his own application, was added as a co-plaintiff to the pending suit on 25-2-48. Thereafter, the suit proceeded and eventually it was dismissed so far as the claim for ejectment and mesne profits was concerned, the learned Munsif merely passing a decree for rent for August 1949 which was also a part of the claim in suit. On appeal, this decision was affirmed by the learned Additional Subordinate Judge, but on second appeal to this Court, the case was remanded to the trial Court for re-hearing according to law. This re-hearing before the learned Munsif again resulted in a dismissal of the claim for ejectment and mesne profits, but on appeal, that decision was reversed by the learned Subordinate Judge who gave the added co-plaintiff a decree for ejectment and mesne profits in addition to the decree for rent, already made by the learned Munsif. Hence this appeal by the sub-tenant defendant.

Before passing on to the rival contentions of the parties in this appeal, it is necessary to state that, on the previous occasion, the decree for ejectment and mesne profits was refused by the two courts below really on the ground that in the absence of a permission from the Rent Controller under section 13 of the Calcutta Rent Ordinance 1946, the suit for ejectment, wherein one of the grounds, taken was bonafide requirement of the disputed premises for the landlord's own use and occupation, was not maintainable. Indeed, it appears clear that was the very basis of the judgments of the two courts below which were ultimately set aside by this Court in the second appeal, wherein the order of remand and re-hearing of the suit according to law was made.

The main defence to the plaintiff's claim for ejectment was that, as one of the grounds, given in that behalf in the plaint, was bonafide requirement for the landlord's use and occupation, and as admittedly, there was no permission from the Rent Controller under the Rent Ordinance of 1946 which was in force when the suit was filed, the suit for ejectment could not be entertained by the Court. This defence succeeded, as I have already stated, before the two Courts below on the earlier occasion and also before the learned Munsif at the re-hearing after remand,

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The learned Subordinate Judge, however, in his judgment which is now under appeal rejected this defence upon the view that the absence of permission affected only the ground of bonafide requirement and, as that was not pressed during the trial, there was no bar to the Court's decreeing the suit on other grounds and he having found that there was unauthorised and unlawful subletting to the present appellant, ruled out all defences under the Rent Control Law in view of the express provision of section 12, Sub-section 1, proviso (b) of the 1946 Ordinance which governs the present case. A decree for ejectment and mesne profits was made by him in the co-plaintiff's favour. The learned Subordinate Judge also held that under section 13 of the Ordinance permission was necessary only to evict the "tenant in possession" and as the said expression referred, according to the learned Judge only to a tenant in actual possession or physical occupation of the disputed premises and did not include a tenant who had sublet the whole of the premises in question and was thus at the most only in what may be called constructive possession, it was unnecessary for the plaintiff to take such permission in the present case. Mr. Chakravarti who appears for the appellant before me has vehemently criticised the view of the law, taken by the learned Subordinate Judge, as appearing above, and I am unable to say that his criticism is wholly without force.

Section 13 of the Calcutta Rent Ordinance 1946 clearly states that "No suit or proceeding by a landlord against a tenant in possession of any premises for eviction of such tenant therefrom in which any of the grounds specified in clause (d) of the proviso to sub-section (1) of section 12 has been taken as a ground for such eviction shall be entertained by any Court unless the landlord has been permitted by the Controller by an order in writing under sub-section (3) to institute such suit or proceeding and has produced before such Court proof that such permission has been granted."

Section 12(1) (d) is in these terms: "Where the premises are bonafide required by the landlord either for purposes of building or re-building, or for his own occupation or for the occupation of any person for whose benefit the premises are held, or where the landlord can show any cause which may be deemed satisfactory by the Court."

If therefore, the suit be one where the permission of the Rent Controller is necessary under the above section 13, of the Ordinance, the absence of such permission will vitiate the entire suit for ejectment and not merely the ground of bonafide requirement. The mere fact that that ground is not pressed at the hearing or that the suit may be decreed on other grounds would not alter the position or prevent dismissal of the claim for ejectment under the imperative provisions of the said section quoted above. The principle, underlying the decision in *Prafulla Kumar Dutta* v. *Guiram Tat* (1), equally applies to a case under the Calcutta Rent Ordinance so far as this point is concerned. In my opinion, the learned Judge was not right in laying aside that decision altogether merely because it was given under the earlier law, namely, the Calcutta House Rent Control Order of 1943 and in holding that, as the ground of bonafide requirement was not pressed before the Court, there was no bar to the granting of the decree for ejectment on account of unlawful or unauthorised sub-letting. That part of the judgment of the lower Appellate Court, cannot therefore, be supported. The other reason, given by the learned Subordinate Judge, namely that the tenant in the present case having admittedly sublet the whole of the premises cannot be regarded as a "tenant in possession" within the meaning of section 13 of the Ordinance and the suit, therefore, would be outside its mischief cannot, however, be so easily met. On the said question, much may be said on either side, and various aspects require to be closely examined before that question can be finally answered. In the view, however, which I am taking in this case, it is unnecessary to express any opinion on the merits of the said question and, accordingly, I leave it unanswered, Granting that the expression "tenant in possession" in section 13 of the Ordinance includes a tenant who is in possession only through sub-tenants, that is, a tenant who has wholly sublet the premises and that, accordingly, permission from the Rent Controller was necessary in this case and without such permission the present suit for ejectment would not have been maintainable in law, such an objection is not, in the events which have happened in this case, open now to the appellant. When the matter came up to this Court on the previous occasion, the suit had been dismissed on this very ground by the two Courts below. But that decision

(1) (1950) 54 C.W.N. 624.

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was set aside by this Court and the case was sent down for re-hearing. The present objection which is plainly a plea in bar to the entertainment of the suit could and should have been taken before this Court on that earlier occasion in the second appeal in which that order of re-hearing was made, and, if accepted, it would have entailed a dismissal of the said second appeal and the remand would have been wholly unnecessary. It was argued by Mr. Chakravarti that as the case was remanded for a fresh decision the defence was entitled to rely on this plea in bar under section 13 of the Ordinance over again. I do not, however, read the remand order of this Court as leaving this question this preliminary objection under section 13 of the Ordinance open between the parties. That being so, the plea, whatever its merits, must be held to have become barred by constructive *res judicata* and, however unfortunate it may be for the appellant, it cannot be entertained now. On this ground I hold that the defence based on section 13 of the Calcutta Rent Ordinance, cannot succeed and the learned Subordinate Judge's decision on that point must be upheld though on a different ground.

In the above view of the matter, I hold that the decision of the lower Appellate Court is right and its decree ought to be affirmed subject to this that the appellant will have time till the end of April 1954 to vacate the suit premises and during this period the decree holder will not be entitled to put his decree for ejectment into execution. The imposition of this condition is amply justified by the circumstances of the present case which disclose no immediate requirement of the suit premises by the respondent landlord, namely, Lila Mohan Singha Ray, whereas the appellant who is a professional man may be put to extreme hardship if he be immediately outside from the said premises.

Subject to the above observations, this appeal is dismissed and, as to costs, there will be no order in this Court. The order for costs made by the lower appellate Court will, however stand.

Leave to appeal under Clause 15 of the Letters Patent is asked for and is refused.

P.K.D. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice K. C. Das Gupta and Mr. Justice D. Mookerjee.

SANTI NATH CHOWDHURY

v.

PANCH KORI DAS & ORS.*

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1954.

January, 28.

Ejectment—Transferee from a tenant—Tenancy created for construction of pucca building before Transfer of Property Act—If liable to be ejected by the Landlord.

If a tenancy be transferable, the stipulation to transfer it only to the lessor and the lessor's successors and the bar against alienation to other persons is void, as infringing the rule against perpetuities.

The rule that there would be no ejectment of the transferee of a lessee in the absence of a provision for right of re-entry or equivalent provision has been held to be applicable to leases created before the Transfer of Property Act.

Those questions can, however, arise only if the tenancy was, except for the provision against restraint, transferable. If the tenancy is not transferable, the provision that transfer can be made only to the lessor or his successor does not make it transferable to others. In such a case the transferee would be a trespasser and the landlord would be entitled to khas possession.

Whether a tenancy created before the Transfer of Property Act is transferable or not is to be decided apart from the provisions of Section 108 of the Transfer of Property Act, for Section 108 is not applicable to a tenancy created before the Transfer of Property Act.

Tenancies which are heritable are not necessarily transferable.

Under the law as it stood before the Transfer of Property Act tenancies whether of homestead lands or of agricultural lands were not transferable in the absence of custom to the contrary or of an express contract to that effect.

Mere long possession of homestead land is not sufficient to justify the presumption of a permanent and transferable grant. Before such a pre-

*Appeal from Original Decree No. 82 of 1949 against the decree of Sri K. P. Mukherjee, Subordinate Judge, First Court of Zillah Howrah, dated the 30th day of December, 1948 in Title Suit No. 48 of 1946.

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sumption can be made there must be something more, viz., either (1) the land having been let for the erection of pucca buildings or (2) a standing by on the part of the landlord while the tenant without objection erects permanent buildings or effects substantial improvement on the land

The result of decided cases is that where the lease was given before the Transfer of Property Act, and

(1) all that appears is that the tenancy is of homestead land, it is not transferable;

(2) if the original letting was for the purpose of building cutcha structure, it is transferable according to some authorities and not transferable according to some;

(3) if the original letting was for building pucca structure, it is transferable.

In the present case the tenancy was created with the express purpose of construction of pucca building for residence. That alone is sufficient for a conclusion that the tenancy was ordinarily transferable.

Appeal by the Transferee Defendant.

Suit for khas Possession and mesne profits.

The material facts will appear from the judgment.

Prafulla Kumar Roy and Satya Charan Pain for the Appellant.

Sarat Chandra Jana and Arun Kumar Jana for the Respondents Nos. 1 & 2.

Lala Hemanta Kumar and Sudhir Kumar Dutt for the Respondents Nos. 4 & 5.

The judgment of the Court was as follows:—

K. C. Das Gupta, J.:—The subject matter of this litigation is holding No. 8, Rajballav Saha Lane, within the Howrah Municipality. Admittedly defendants Nos. 2 to 5 held this land as tenants under the plaintiff. The tenancy was created in favour of predecessor in interest of defendants 2 to 5 by the plaintiff's predecessor-in-interest on the 26th March 1865. The plaintiff

has brought the present suit for khas possession of the property and masne profits and in the alternative for damages on the allegation that "none of the defendants Nos. 2 to 5 have any right and title whatsoever to sell the said property contrary to the terms of the Patta and Kabuliyat and that according to the terms of the Patta and Kabuliyat they were bound to sell the property to the plaintiff and that defendant Nos. 2 to 5 having sold the property contrary to the terms of the said Patta and Kabuliyat the plaintiff was entitled to get possession of the property is suit. The Kabuliyat is in these words:-

"This Kabuliyat is executed by (Sree Lakshimoni Khanki of Ramkrishnapur, Pargana Boro, District Howrah, to the effect following:—

You grant unto me a Maurasi Patta in respect of 2½ Cottahs (two and half cottahs more or less) and land lying within the boundaries given below and comprised within the residential house purchased by you on fixing the annual rent therefore at Rs. 10/- and on receiving from me a Selami of Rs. 57/-. I shall go on possessing and enjoying the aforesaid land down to my heirs in succession by erecting houses and brick built structures etc. thereon. I shall pay the amount of the rent year after year as per the instalments stated below. If I make default in payment of the instalments I shall pay interest according to the custom. The rent of this land shall never be enhanced or reduced. If I ever transfer my Maurasi interest I shall duly execute (in your favour) a Kobala in respect of the buildings and of the Jotedari (tenancy) interest along with the Mourashi Patta granted by you on accepting from you the amount of the consideration that would be fixed by some respectable persons assembled together as arbitrators. I shall not be competent to execute the same in favour of any one else except your Sircar (estate). If I or my heirs do so, the same shall be void and be rejected. To the above effect, I execute this deed of Mokarari Kabuliyat on accepting a patta of Mourashi Jama. Dated the 14th Chaitra. 1271; (Twelve Hundred and Seventy-one) B.S. = 26th March 1865."

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The learned Subordinate Judge was of opinion that as the lease simply provides that the transfer made by the lessee would be void and there was no right of re-entry reserved, the clause of bar to the alienation of the property was void. He also held that the stipulation to transfer only to the lessor and its successors was hit by the rule against perpetuity. Accordingly he dismissed the suit.

The main dispute in this Court has been on a point which was curiously enough not raised in the Court below. Before the Subordinate Judge both the parties appeared to have proceeded on the basis that except in so far as prevented by the terms of the contract the tenancy was transferable. If it was transferable, the bar against alienation, would be void, as infringing the rule against perpetuities.

The rule that there would be no ejectment of the transferee of the lessee, in the absence of a provision of a right of re-entry, or equivalent provision, has also been held to be applicable to leases before the Transfer of Property Act, as a rule of justice, equity and good conscience. These questions can arise however, only if the tenancy was except for the provision against restraint transferable. If the tenancy is not transferable, the fact that a provision has been made that transfer can be made only to the lessor or his successor would not make it transferable to others and the transferee would obtain no right thereunder. The transferee in that case would be a trespasser and the landlord would be entitled to khas possession.

Strangely enough the question whether the land was transferable or not does not appear to have been raised in the Court below. The plaintiff did not state in so many words that the tenancy was non-transferable quite apart from the terms of the contract. All that is said on this point was contained in paragraph 6 of the plaint in these words: "None of the defendants Nos. 2 to 5 have any right and title whatsoever to sell the said property contrary to the terms of the said Patta and Kabuliyat. According to the terms of the said Patta and Kabuliyat, the defendants Nos. 2 to 5 are bound to sell the said property to the plaintiff." The defendant No. 1 took the definite plea in paragraph 3 of his written statement that the land in suit was

held in Mokorari Mourashi right with right of transfer and that it having been transferable according to law the plaintiff in succession of her predecessor-in-interest recognised that under plea or objection. It is difficult to understand why no issue was framed on this question. The fact that the lawyers of the parties argued at length on the applicability of the principle of section 10 of the Transfer of Property Act, suggests that both the parties proceeded in the Court below on the assumption that the tenancy was transferable, apart from the special term of the contract.

The question for decision is whether without any evidence being adduced on this point it is possible to come to conclusion as regards the transferability. It has been contended by Mr. Jana on behalf of the respondents that the Ex 3 itself shows that the lease was given for the purpose of erecting pucca structures for the purpose of residence and that on the authority of the decision in *Banee Madhub Banerjee* v. *Joy Kishen Mookerjee* (1), such a tenancy should be held to be transferable even before the Transfer of Property Act. There is obviously no question of the provisions of section 108 of the Transfer of Property Act being applicable to this case. Whether a tenancy created prior to the Transfer of Property Act was transferable or not has to be decided quite apart from the provisions of section 108 of the Transfer of Property Act; for these certainly are not applicable to such a tenancy. In *Banee Madhub Banerjee's case* (1), Sir Barnes Peacock, Chief Justice, observed that

> "If one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of any evidence to the contrary, would be assignable. I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another. By assigning his interest he does not necessarily get rid of his liability to pay the rent reserved."

In that case all the three learned Judges held that the tenancy in question was transferable. Macpherson, J. based his decision only on the fact that there was evidence to show that the tenure was, according to the custom of the district, transferable. Jackson, J. also said that there was certainly evidence

(1) (1869) 11 W R. 354.

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existence of such a custom but he further observed:

> "The parties in occupation of this land, which confessedly was let for building purposes, had been allowed gradually to pull down the temporary buildings first erected and substitute in their place more permanent ones. I think where this is sanctioned, there must be implied a right on the part of the tenant to convey his interest to other persons."

Sir Barnes Peacock himself in a previous part of his judgment stated this:—

> "If he (the plaintiff) allowed the defendants to erect pucca buildings upon the land without objecting, it appears to me that he was bound in the same way in equity as if he had granted them a pottah with the privilege of building pucca houses on the land."

It appears clear from the judgments that while all the three learned Judges were agreed as regards the existence of a custom of transferability, both Sir Barnes Peacock, C.J. and Jackson J. were of the opinion that if Pucca building are allowed to be constructed, a right to the tenant to convey his interest must be implied. Sir Barnes Peacock himself went further and said that where the tenancy was granted for the purposes of building for living there the right will be assignable.

In recent years in *Sulin Mohan Banerjee's case* (1), Sir Ashutosh Mookerjee, Acting Chief Justice, had to consider the question of transferability of a tenancy. After pointing out that tenancies which are heritable are not necessarily transferable, His Lordship observed:

> "Now it has been laid down by this Court in the cases of *Harinath Karmakar* v. *Raj Chandra Karmakar* (2), *Madhab Chandra Pal* v. *Bejoy Chand Mahatab* (3), *Madhu Sudan Sen* v. *Kamini Kanta Sen* (4), *Ram Charan Naskar* v. *Hari Charan Guha* (5), that under the law as it stood before the Transfer of Property Act tenancies whether of

(1) (1920) 33 C. L J. 193.
(2) (1897) 2 C.W.N. 122.
(3) (1900) 4 C.W.N 574
(4) (1905) I L.R. 32 Calc. 1023.
(5) (1906) 7 C.L.J. 107.

homestead lands or of agricultural lands were not transferable in the absence of a custom to the contrary or of an express contract to that effect. The only recognised exception to this rule is that stated in the case of *Banee Madhub Banerjee* v. *Joy Kishen Mookerjee* (1). In that case Sir Barnes Peacock, Chief Justice, observed that if one man grants a tenure to another for the purpose of living upon the land, that tenure in the absence of evidence to the contrary is assignable. The same view was subsequently taken in the case of *Doorga Pershad Misser* v. *Brindabun Sookul* (2).

In the case before us the tenancy have not been created for the purpose of residence. Consequently we must hold that the tenancy was not transferable.

Speaking about this decision in *Sarada Kanta Sen Gupta* v. *Nabin Chandra Sen Gupta* (3), where also the question was whether a lease of homestead land created before the Transfer of Property Act was transferable by law or not Page J. expressed his view that in *Sulin Mohan's case* (4), Sir Ashutosh Mookerjee, when referring to the case decided by Chief Justice Peacock did not do so for the purpose of expressing approval of the observations in that judgment which have been cited above. With great respect to the learned Judge I am of opinion that Sir Ashutosh's observations in *Sulin Mohan's case* (4), cannot but be read as an approval of what had been laid down as the law by Sir Barnes Peacock. Referring to the observations of Peacock C.J. in *Banee Madhub Banerjee's case* (1), Page J. expressed his view in these words:—

"In our opinion, these observations of Peacock C.J. are opposed to the settled view of this Court and cannot now be regarded as correctly stating the law."

Prior to this in the case of *Madhu Sudan Sen* v. *Kamini Kanta Sen* (5), Maclean C.J. and Mitra J. had expressed doubt as regards the correctness of those observations of Sir Barnes Peacock. They however did not state clearly that in their view Sir Barnes Peacock's observations did not state the law correctly. It will be helpful at this stage to consider some of the previous

(1) (1869) 11 W.R. 354
(2) (1871) 15 W.R 274.
(3) (1926) I.L.R. 54 Calc. 333
(4) (1920) 33 C.L.J. 193.
(5) (1905) I.L.R. 32 Calc. 1023.

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decisions of this Court by which Page J. seemed to think that the law had been settled in a way different from that Chief Justice Peacock had stated. As has been stated above the same view as Sir Barnes Peacock took in *Banee Madhub Banerjee's case* (1) was taken by a Bench of this Court in the case of *Doorga Pershad Misser* v. *Brindabun Sookul* (2). The next case in point of time in which the question of transferability appears to have been considered was *Harinath Karmakar* v. *Raj Chandra Karmakar* (3), Rampini J. sitting singly in that case held that it could not be inferred from the mere fact that a non-agricultural holding was used for residential purpose that it was transferable. Referring to the decision in *Banee Madhub Banerjee's case* (1). Rampini J. says that previous to the passing of the Transfer of Property Act, non-agricultural land might or might not have been assignable and that being so it was incumbent upon the learned Subordinate Judge to come to a finding upon this question. The learned Judge remanded the case to the lower appellate Court for an express finding as to whether the interest of the plaintiff's vendor was transferable. In the following year Rampini J. had again to deal with a case in which the landlord sought to eject the defendants, one of whom was his admitted tenant and the other the purchaser from the tenant on the ground that the tenant's right was not transferable. The learned Judge referred the matter to a Full Bench expressing his own view that if land is let for building pucka house upon it and if the tenant with the knowledge of the landlord does in fact lay out large sums upon it in buildings or other substantial improvements, that fact, coupled with long continued enjoyment of the property by the tenant or his predecessor in title, might justify any Court in presuming a permanent grant, especially if the origin of the tenancy could not be ascertained. It is necessary to mention that it is clear from the referring judgment in the case of *Nabu Mondul* v. *Cholim Mullik* (4), that the learned Judge meant the word 'permanent' to include the attribute of transferability. The Full Bench held that the reference was irregular, it not being competent for a Judge sitting alone to make a reference to a Full Bench. When the case went back to Rampini J. he decided the case in these words:

(1) (1869) 11 W.R. 354.
(2) (1871) 15 W.R. 274
(3) (1897) 2 C.W.N. 122.
(4) (1898) I.L.R. 25 Calc. 896.

"The cases I have cited in my judgment of reference may lay down no hard and fast rule on the subject, but the rule which I think should be deduced from them is, as I have already pointed out, that mere long possession of homestead land is not sufficient to justify the presumption of a permanent grant, and that before such a presumption can be made there must be something more, viz., either (1) the land having been let for the erection of pucka buildings or (2) a standing by on the part of the landlord while the tenant without objection erects permanent buildings or effects substantial improvements on the land . . . . . Taking this view of the matter, I must hold that the Court below was not justified in presuming that the defendant No. 2 had a permanent and transferable interest in the land and therefore that the suit should have been decreed."

In the year 1900 a similar question arose again before Rampini and Wilkins JJ. in the case reported in *Madhab Chandra Pal* v. *Bejoy Chand Mahatab* (1). That was a case of an agricultural holding. In deciding that the holding was not transferable. Their Lordships observed:—

"The pleader for the appellant says that under the law existing before the Transfer of Property Act, tenancies of this nature were transferable against the will of the landlord and could also be sub-divided. He has, however, not been able to call our attention to any ruling to this effect and we are not aware that such is the law. On the contrary, we think that before the Transfer of Property Act was passed there was no distinction drawn between agricultural and non-agricultural tenancies. But however that may be, we are unable to see that there is any law under which before the passing of the Transfer of Property Act agricultural holdings could be transferred against the will of the landlord or sub-divided without his consent."

Shortly after this came a quick succession of cases in which the question of transferability of a tenancy of homestead land from year to year came up for consideration. First in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2), it was held that "the incident of non-transferability was common to tenancies from

(1) (1900) 4 C.W.N. 574. (2) (1905) I.L.R. 32 Calc. 1023.

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year to year of homestead lands created before the passing of the Transfer of Property Act in the absence of a custom to the contrary." This was followed by Rampini and Mookerjee JJ. in *Ram Charan Naskar* v. *Hari Charan Guha* (1), by Chatterjee and Mullick JJ. in *Ananda Mohan Saha* v. *Gobinda Chandra Ray Choudhury* (2), and by Chatterjee and Greaves JJ. in *Manmoth Nath Mitter* v. *Anath Bandhu Pal* (3). It is important to remember that in none of these cases the tenants made out a case that the original letting was for building purpose. All that we find from the reports are that the tenancy was of homestead land. It will not, in my judgment, be reasonable to hold that the Court proceeded on the assumption that the tenancy was for the purpose of building. What is however absolutely clear is that in none of these cases was the letting for building pucka structures.

The result of these decided cases, in my opinion is that where the lease was given before the Transfer of Property Act, and

(1) all that appears is that the tenancy was of homestead land, it was not transferable;

(2) if the original letting was for the purpose of building cutcha structure, it was transferable, according to some authorities and not transferable according to some;

(3) If the original letting was for building pucka structures, it was transferable.

There can be no doubt that in the present case the tenancy was created with the express purpose of construction of pucca building for the purpose of residence. That alone in my judgment is sufficient for a conclusion that the tenancy was ordinarily transferable.

My conclusion therefore is that the suit was rightly dismissed. This appeal is therefore dismissed with one set of costs to be divided equally between the two sets of respondents.

Debabrata Mookerjee, J.:—I agree.

P.K.D. *Appeal dismissed.*

(1) (1906) 7 C.L.J. 107 (2) (1915) 20 C.W.N. 322,
(3) (1918) 23 C.W.N. 201.

APPELLATE CIVIL.

Before Mr. Justice G. N. Das.

SHAMBHUDAS CHAKRABARTY,

v.

SUBODH GOPAL BOSE.*

CIVIL.

1954.

February, 11.

Estoppel—Interest auction-Sold described as an occupancy holding in the Sale-certificate—Decree-holder, if estopped from asserting the contrary—Occupancy holding, if annullable by a purchaser at a revenue sale.

The plaintiff-respondent, a purchaser at a sale for arrears of revenue, instituted a suit for recovery of arrears of rent directly from the tenant in actual possession of the land on the allegation that he had annulled all intermediate interests. The appellant, who had auction-purchased an intermediate interest at a rent sale and was impleaded in the plaintiff-respondent's suit, opposed the plaintiff-respondent's suit, contending that the interest which he had auction-purchased was an occupancy-holding and was therefore not annullable and that, in consequence, he and not the plaintiff-respondent was entitled to get rent from the tenant in actual possession. There was dispute between the appellant and the plaintiff-respondent regarding the nature of the interest auction-purchased by the appellant. The interest was described as an occupancy holding in the appellant's sale-certificate. The plaintiff respondent being decree-holder in the execution proceeding, he is estopped from asserting that the interest was not an occupancy-holding. The case was sent back to the Trial Court for further hearing on the question of estoppel.

Appeal by Proforma-defendant No. 9.

Suit for recovery of arrears of rent.

The material facts will appear from the judgment.

Ranjit Ghose for the Appellant.

Jogi Gopal Ghose for the Respondents.

*Appeal from Appellate Decree No. 1172 of 1948, against the decree of Additional District Judge, 3rd Extra Additional Court of Zillah 24 Parganas, in Rent Appeal No. 26 of 1947, dated the 31st of March, 1948, affirming the decree of Sri A. K. De, Munsif, 2nd Court, Baruipur, dated 16th of January, 1947.

CIVIL.

1954.

Shambhudas Chakrabarty v. Subodh Gopal Bose.

February, 11.

The judgment of the Court was as follows:—

C. N. Das, J.:—This is an appeal by Sambhudas Chakravarty who describes himself as proforma defendant No. 9 against a decision of Sri Renupada Mukherjee, as he then was Additional District Judge, 24-Parganas, dated the 31st March, 1948, affirming a decision of Mr. A. K. De, learned Munsif, Baruipore. In order to appreciate the contention which Mr. Ghose, the learned Advocate for the appellant, has sought to raise in this appeal, it is necessary to set out certain preliminary matters. This aspect of the case was not considered by the courts below presumably because it was not brought to their notice. The plaintiff Subodh Gopal Bose instituted a suit for recovery of rent in respect of a tenancy bearing a rental of Rs. 9-9-9 p. said to have been recorded in Khatian No. 121 which is subordinate to Khatian No. 120 in touji No. 341, mouja Nachangacha. In the plaint the principal defendants are defendants 1 to 5. The latter are said to be the heirs of Tamizuddin Naskar as appears from the cause title in the plaint. This is followed by the names of certain persons described as defendants, these persons being stated to be (2) Gokul Chandra Chakrabarty, heir of deceased Nakul Chandra Chakrabarty, (3) Sm. Urmilabala Debi (4) Shibdas Chakrabarty and (5) Sambhudas Chakrabarty (who it may be pointed out is the appellant in this appeal) wrongly describing himself as proforma defendant No. 9.

In the plaint the plaintiff claims to have purchased at a sale for arrears of revenue Touzi No. 341. His further case is that he annulled all encumbrances and tenures and under tenures including the interest of defendants 2 to 5 and that on this footing he claimed rent from defendant No. 1 recorded in Khatian No. 120. It does not appear that C. S. Khatian No. 108 of which defendants 2 to 5 are said to be recorded as in possession, was not placed on the record. In the courts below the main contest centred round the defence taken by Sambhudas Chakrabarty that the disputed land which is C. S. Dag No. 177 did not appertain to touzi No. 341 but that it appertained to touzi No. 342 of which the plaintiff Subodh Gopal Bose was a purchaser by a private treaty. This defence was put forward so as to prevent the plaintiff Subodh Gopal Bose from annulling the interest of all under tenure holders including the Chakra-

barty defendants and as such disentitling the plaintiff from claiming rent from the tenants, the principal defendants 1 to 4 (Naskars). Both the courts below have negatived the defence and have decreed the plaintiff's suit. Mr. Ghose, learned Advocate for the appellant contended the propriety of the finding arrived at by the courts below that the disputed land did not appertain to touzi No. 342. He has drawn my attention to the Sale Certificate Ext. A1 and the evidence of P.W.1, plaintiff's *karmachari* who deposed to say that he could not tell the court to which touzi the disputed land appertain. In my opinion it is difficult to say that the presumption raised by the Settlement Record of Rights that the disputed dag 177 is situated within touzi No. 341 has been rebutted by the evidence to which my attention has been drawn. The finding of fact reached by the courts below that the disputed plot 177 appertained to touzi No. 341 which the plaintiff Subodh Gopal Bose has purchased at a revenue sale held on 9-1-42 must be affirmed. The first contention of Mr. Ghose must be overruled.

Mr. Ghose also contended that in view of the terms of the sale certificate Ext. A-1, the plaintiff is precluded from asserting that the disputed land is situated in touzi No. 341. This may not be correct but looking into the matter closely it seems to me that the plea of estoppel on which the defendants seek to rely requires consideration. The plaintiff's case is that as a purchaser at a revenue sale he has annulled the interest of the Chakrabarti's defendants 2 to 5, and that such annulment entitled him to recover rent from the tenants on the land in possession of C. S. Dag 177. In the plaint the interest of the said Chakravarti defendants 2 to 5 is said to have been recorded in Khatian No. 118. Unfortunately that Khatian is not on the record. It may be presumed that the plaintiff wanted to suggest that the interest of the Chakrabarti defendants (2 to 5) was that of a tenure holder and was annullable by the plaintiff, the purchaser at a revenue sale. It has been contended that the answer to this may be found if we examine the terms of the sale certificate at which the appellant Sambhudas Chakrabarty purchased. Satya Bikash Banerjee claiming to be the landlord of a holding bearing a rental of Rs. 4-6-6 p. instituted a suit for rent against Sm. Urmila Devi, Gokul Chandra Chakravarty and Jitendra Nath Chakravarty. Having obtained a decree for

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rent, Satya Bikash Banerjee started execution proceedings givir rise to Rent Execution Case No. 141 of 1942. In the course c this execution proceedings the interest of Satya Bikash Banerje was presumably sold and in place of Satya Bikash Banerjee th plaintiff Subodh Gopal Bose was substituted by an order of th court dated the 4th of January, 1943. The execution proceed ings went on and the holding described in the Sale Certifica as being an occupancy holding with a rental of Rs. 4-6-6 recorded in Khatian No. 121, Dag No. 177, was brought to sa and at the sale held on the 3rd December, 1942, the appella Sambhudas Chakrabarty purchased for a sum of Rs. 64/8/- a This sale was confirmed on the 4th of January 1943, the date c which Subodh Gopal Bose was substituted as decree holde It is contended that plaintiff Subodh Gopal Bose, the executi landlord in the aforesaid rent execution case is estopped fro asserting that C. S. Dag No. 177 was held by the defenda appellant in any right other than that of a settled raiyat. Th interest of a settled raiyat is *prima facie* not annullable by purchaser at a revenue sale. As such the plaintiff would l estopped from asserting that the interest of the appella Sambhudas Chakrabarty was an annullable interest. If th view is correct, then the plaintiff Subodh Gopal Bose cann claim rent from the principal defendants 1 to 5 (Naskars) ar the plaintiff's suit will fail. In support of the submissions M Ghose has referred me to a decision of this Court in the case *Chitra Debi and Ors.* v. *Badri Bisal Bhakat and Ors.* (1). As t present case has not been considered from the above points view, it is necessary to send the case back to the trial court f further hearing on the question indicated above. The parti will be entitled to adduce further evidence only on the poi indicated above.

The result therefore is that this appeal is allowed. Jud ments and decrees of the courts below are set aside and this ca remitted to the trial court for disposal in the light of observatio made above.

There will be no order as to costs up to this stage. Furth costs will abide the result.

Appeal allowed.

P.K.D.

(1) (1952) 89 C.L.J. 209.

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee and Mr. Justice S. K. Sen.

THE MONDALGHAT ZEMINDARY SYNDICATE LTD., MANAGING AGENTS MESSRS. N. N. LAHA & CO.

v.

KATYANI DASI.*

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September, 8.

Decree passed against a person and decree passed in his presence against other persons—Distinction between—Legal effect of the two decrees.

The appellant and the Respondent No. 1 were co-sharer landlords of a putni tenure. The rent of the putni in appellant's share having fallen into arrears, the appellant instituted rent suit under Section 148A, B. T. Act. In execution of the decree passed in the said suit the defaulting putni was sold and purchased by the appellant. Thereafter the respondent No. 1 instituted rent suit for recovery of arrears of rent due in her share. In this suit the appellant was impleaded as co-sharer landlord and not as tenant, appellant's antecedent auction-purchase not having been confirmed yet. Appellant's auction-purchase was, however, confirmed during the pendency of respondent No. 1's suit but the respondent No. 1 did not amend her plaint by inserting therein a prayer for a decree against the appellant. Respondent No. 1's suit was in consequence decreed only against the previous putnidars but not against the appellant although the decree was passed in appellant's presence. The appellant was also impleaded as judgment-debtor in the execution case which followed the decree passed in respondent No. 1's suit. In that execution case the appellant filed an objection under Section 47, C.P.C. The principal ground taken in that objection was that, the putni having already passed to the appellant by reason of appellant's antecedent auction-purchase and the respondent No. 1 not having impleaded the appellant as tenant or holder of the Putni in her suit and her suit having been decreed only against the previous Putnidars and not against the appellant, the defaulting Putni, which had passed to the appellant before the decree in respondent No. 1's suit was passed, could not be sold again in execution of respondent No. 1's decree. The decree in respondent No. 1's suit had the effect only of a simple money decree which could not be executed against the Putni in appellant's hands. The facts that the decree was passed in appellant's presence and the appellant was impleaded as judgment-debtor in the execution case which followed the decree were altogether immaterial.

* Appeal from Original Order No. 129 of 1951 against the order of Sri Umadas Gupta, Additional District Judge of Zillah Howrah in Miscellaneous Appeal No. 144 of 1951, dated the 14th of September, 1951, reversing the order of Sri Shib Chandra Dutta, Subordinate Judge, 1st Court, Howrah, dated the 21st of May, 1951.

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Section 148A, B. T. Act, is concerned, only with the representation of landlord's interest in a suit for rent.

Appeal by the Judgment-debtor.

Second Miscellaneous appeal against an order under Section 47, C.P.C.

The material facts will appear from the Judgment.

Hemendra Chandra Sen and Satyendra Chandra Sen for the Appellants.

Dr. Sen Gupta and Sachindra Chandra Das Gupta for the Respondent.

The judgment of the Court was as follows:—

P. N. Mookerjee, J.:—The appellant and the respondent No. 1 were co-sharer landlords of a putni tenure which was held under them at an annual rent of Rs. 4,522/-. The appellant was the landlord to the extent of a twelve annas and odd gandas share and the respondent No. 1 had the remaining three annas and odd gandas share.

In the appellants share the putni rent fell into arrears for the years 1348 to 1351 B.S. and, for recovery of the said arrear rents, the appellant instituted Rent Suit No. 2 of 1945 in the Court of the Subordinate Judge, 1st Court, Howrah framed in accordance with the provisions of section 148 A of the Bengal Tenancy Act, making the respondent co-sharer landlord a party thereto. That suit was eventually decreed on the 5th February 1946 and in execution of that decree the defaulting tenure was sold in Rent Execution case No. 2 of 1948 on the 14th September, 1948, and it was duly purchased by the appellant. This sale was duly confirmed on the 23rd April 1949 and the appellant thus became the sole holder or putnidar of the said putni tenure while remaining its co-sharer landlord to the extent of its 12 annas and odd gandas share.

In the meantime on the 5th April, 1949, the Respondent No. 1 had instituted Rent Suit No. 2 of 1949, for recovery of

arrears of rent of the said putni tenure for the years 1352 to 1355 B.S. in her three annas and odd gandas share and, in that suit, she had impleaded several persons including defendants Nos. 1 to 3 of that suit as tenants and also the appellant, defendant No. 8 as a co-sharer landlord, the latter's auction purchase, referred to above, not having been confirmed till then, and the putni or the suit tenure not having thus passed to it at that time. This sale, however, was confirmed, as I have already said before shortly thereafter, namely, on the 23rd September, 1949, but no further steps appear to have been taken by the Respondent No. 1 in her above suit upon this confirmation and the plaint remained as it originally was. The respondent's rent suit was ultimately decreed on the 29th July, 1950, only against defendants Nos. 1 to 3. No decree, however, was passed in the suit against the appellant who was defendant No. 8 therein, as already stated, although the decree against defendants Nos. 1 to 3 was made in his presence. This decree was put into execution by the decree holder (Respondent No. 1) in Rent Execution Case No. 8 of 1950 and, in that execution case, wherein the appellant also was impleaded as a judgment debtor the defaulting putni was sought to be put up to sale by the Respondent No. 1. Thereupon, the appellant filed an objection under Section 47 of the Code of Civil Procedure, objecting to the sale of the putni at the instance of the Respondent No. 1 in execution of her above decree, and the principal ground taken was that the putni tenure having already passed to the appellant by reason of its auction purchase, confirmed, as aforesaid, on the 23rd September, 1949, that is, during the pendency of the respondent's rent suit, and the latter not having made it (the appellant) a party to the same as the tenant or holder of the suit putni and, in any event, the said suit having eventually been decreed only against the other defendants Nos. 1 to 3, as stated above, and not against the appellant the defaulting putni tenure, which had passed to the latter long before the Respondent No. 1 obtained the decree in her rent suit, could not be affected by such decree or proceeded against or sold in execution thereof. This objection succeeded before the learned Subordinate Judge but, on appeal, it was overruled by the learned Additional District Judge and against this appellate decision the present appeal has been preferred by the appellant.

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P. N Mookerjee, J.

The facts, set out above, are not really in dispute. On those facts, the learned Subordinate Judge found that, as upon the confirmation of the sale, as stated above, on the 23rd April 1949, that is, during the pendency of the respondent's rent suit (Rent Suit No. 2 of 1949) the disputed putni had passed to the appellant, the decree in the latter's suit (Rent Suit No. 2 of 1945) being a rent decree and the resulting sale a rent sale, the respondent's decree, obtained in her Rent Suit No. 2 of 1949, against only the other defendants Nos. 1 to 3, whose interest in the tenancy had already ceased because of the appellant's above purchase, could not but be considered to have had the effect of a simple money decree and that, accordingly, the said decree could not be executed against the putni in the appellant's hands. The learned Subordinate Judge, accordingly, allowed the appellant's objection and exempted this disputed putni from sale in the respondent's execution case (Rent Execution Case No. 8 of 1950). On appeal, however, as I have already said, the learned Additional District Judge came to a different conclusion, holding *inter alia* that the respondent's decree "had the effect of a rent decree" in law and that, accordingly, it was enforceable against the defaulting putni in the appellant's hands. In reaching the above conclusion and particularly, his above finding, the learned Additional District Judge appears to have been influenced by the fact that the appellant was a defendants, namely, defendant No. 8 in the respondent's rent suit and, presumably, on this view, he held in favour of the respondent. To support his conclusion the learned Additional District Judge also brought in Section 168A of the Bengal Tenancy Act, which as it appears from the record, was invoked by the decree holder to support her appeal before him, and, having held that the defaulting tenure had not ceased to exist by merger or otherwise upon the appellant co-sharer landlord's purchase thereof and was thus available to the Respondent No. 1 for realisation of her dues under her above 'rent decree' and that the said section 168A did not stand in her way, and, having found that the Respondent No. 1 was entitled to bring the suit (Rent Suit No. 2 of 1949) for her share of the arrear rents of the disputed putni, the learned Judge proceeded to observe that "it can hardly be that she has right to bring a suit and obtain a decree, but has no right to execute the decree." In the above view of the matter, the learned Additional District Judge allowed the re-

pondent's appeal and dismissed the appellant's objection under Section 47 of the Code of Civil Procedure.

On the admitted facts, as stated above, it seems to me clear that the learned Subordinate Judge was right and his decision ought not to have been reversed. When the Respondent No. 1 brought her Rent Suit No. 2 of 1949 the appellant's purchase at its rent sale had not been confirmed. The respondent No. 1 therefore, was perfectly right at that time in impleading it (the appellant) in her suit only as a co-sharer landlord. When, however, the confirmation came, it was necessary for the Respondent No. 1 to pray for a decree against the appellant also in its newly acquired status of the tenant as a result of the said confirmation and to amend the plaint accordingly. The argument of Dr. Sen Gupta that, as the appellant was already a party to the rent suit, though as a co-sharer landlord, that was sufficient to bind it by the result thereof even as a tenant, that is, even in its newly acquired tenancy right, particularly when in that rent suit the appellant itself in its written statement had mentioned the fact of that confirmation and the court also proceeded upon that footing, does not seem to be very convincing. Even assuming, however, that, in the above state of facts, the appellant must be deemed to have become impleaded in the respondent's rent suit as a tenant defendant, that would not be of any possible help to the Respondent No. 1 in the present case. Whatever might have been the findings of the Court on that occasion, the decree was actually passed only against the other defendants Nos. 1 to 3 and there was no appeal but the Respondent No. 1 accepted this decision and it is this decree which is now sought to be executed. It is not possible to argue—and, indeed, that is not the respondent's case—that the appellant was represented in the respondent's suit by the other defendants Nos. 1 to 3, against whom alone the respondent's decree was obtained, or that the defaulting tenure, even after the confirmation of the appellant's auction purchase, continued to be represented in the said suit by the said defendants Nos. 1 to 3. It is difficult, therefore to hold that the said decree, when it was not passed against the appellant, would bind its interest in the disputed putni or the said putni in its hands and as admittedly, at the date of the said decree, the putni had already passed in its entirety to the appellant, against whom there was no decree

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made in the suit, the decree passed could not have the effect of a "rent decree." The mere fact that the decree against the other defendants Nos. 1 to 3 was made in the appellant's presence would not make it excutable against the latter interest in the defaulting tenure or make it a "rent decree."

When the decree in a rent suit is actually passed against other persons and no decree is made against a particular party, the mere fact that the latter was a defendant in the said suit or that the decree was obtained in its presence would not make the decree executable against its interest in the tenancy on the footing of a 'rent decree,' particularly where there is no case of representation of the entire tenancy by the said other persons against whom the decree is actually passed. A 'rent decree' cannot obviously be obtained without impleading all the tenants, or, those at least, who represent or may be held to represent the entire tenancy. It does not follow, however, that a decree obtained in a suit for rent, where all the tenants are impleaded or those who represent or may be held to represent the entire tenancy are impleaded, would necessarily be a 'rent decree.' If the decree is passed against all the tenants, it would certainly be a 'rent decree.' If, again, the decree is passed against those of the tenants who represent or may be held to represent the entire tenancy, it would also be a 'rent decree.' If, however, no decree is passed, even though wrongly, against the admitted tenant or tenants or some of them while the decree is made though in their presence only against the rent who do not represent or cannot be held to represent the tenancy at all at the date of the decree—as it has happened in the present case—or do not represent or cannot be held to represent the entire tenancy at that date, the decree cannot have the effect of a 'rent decree.' The learned Additional District Judge was therefore, not right in holding that the respondent's decree in her Rent Suit No. 2 of 1949 "had the effect of a 'rent decree'."

It is also difficult to see how, in the present case, Section 168A of the Bengal Tenancy Act can at all be relevant from the decree-holder's point of view or to support the Lower Appellate Court's decree. It no doubt appears that the decree-holder (who was the Appellant in the Court of Appeal below) took

a specific ground, namely, Ground No. 4, in her Memorandum of Appeal that "in view of . . . . . Section 168A of B. T. Act" she was entitled to produce against the tenure in execution of her decree. Possibly also, before the Lower Appellate Court, this ground was very strongly urged by the decree-holder (Appellant) in support of her appeal as is indicated by the learned Additional District Judge's observation in his judgment that "the ground urged in support of the appeal are that the view taken by the learned Subordinate Judge is erroneous in as much as there has been no merger of the tenure in view of the auction purchase of the tenure by the Mondalghat Zemindary Syndicate Ltd." But I am entirely unable to appreciate the relevancy of the above argument of the decree-holder or the learned Additional District Judge's long discussion in his judgment on the above section as an aid either to the decree holder's appeal before the Lower Appellate Court or the learned Judge's final conclusion in the case. The section quoted has in my opinion, no bearing on the case before us and the use, sought to be made of it by the decree-holder, namely to upset the adverse finding of the learned Subordinate Judge that her decree was a mere "money decree" and to establish her right to proceed against the tenure in execution of the same was wholly unjustifiable and the learned Additional District Judge was evidently in error in relying upon the same. Nothing in that section can affect or alter, in any manner whatsoever, the legal position of the parties in the present case or the decision thereof. Nor is the result affected in any way by the fact that the respondent's Rent Suit No. 2 of 1949 was brought under or framed in accordance with the provisions of Section 148A of the Bengal Tenancy Act. Strictly speaking, that section has nothing to do with the representation of the tenancy; it is really concerned with the representation of the landlord's interest in a suit for rent and its bearing upon the character of the decree is limited to that aspect of the matter (vide in this connection sub-section (6) of the section and it is thus wholly irrelevant, so far as the question, now before us, is concerned.

It follows, therefore, that the finding of the learned Additional District Judge that the respondent No. 1's decree was a 'rent decree' and her present execution case was in law a 'rent execution case' was clearly erroneous and his attempt to support

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his final conclusion in the case by reference to section 168A of the Bengal Tenancy Act was entirely misconceived and the discussion on that statutory provision in his judgment was irrelevant and unnecessary.

I would accordingly, reverse the decision of the learned Additional District Judge and restore that of the learned Subordinate Judge.

In the result, therefore the appellants objection under Section 47 of the Code succeeds and its Miscelllaneous Case is allowed, as was done by the learned Subordinate Judge.

The appeal is allowed as above but there will be no order as to costs.

S. K. Sen, J.: I agree that the appeal should be allowed. I should like to add however that it does not appear to me that the reference made by the lower appellate court to the provisions of Section 168A of the Bengal Tenancy Act was misconceived. The learned Judge was clearly meeting the argument that Katyayani Dasi, Respondent No. 1, was not entitled to bring a rent suit at all for her dues up to a date prior to the date of confirmation of the sale in favour of the Mandal Ghat Zemindari Syndicate i.e. the appellant, and that she should have claimed her dues from the purchaser at the earlier execution sale, i.e. appellant, under the provisions of Section 168A (1) (b). The learned judge quite properly refuted this argument and held that the respondent was entitled to bring a rent suit as she was not a decree holder under the previous decree. But the learned Judge omitted to consider the further point whether the judgment debtors in the decree obtained by Respondent No. 1 represented the tenancy, and so he came to a conclusion which has to be reversed.

P.K.D. *Appeal allowed.*

APPELLATE CIVIL.

Before Mr. Justice G. N. Das.

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1954.

January, 5.

PITAMBAR DUTTA & ANR.

v.

DWARKA NATH DUTTA.*

Lease and document which is merely an order entitling the grantee to go into possession and to remain in possession on payment of rent—Distinction between the two documents—Admissibility in evidence of a kabala ineffective to pass title.

A document which *per se* does not fix the terms of the lease but only refers to a prayer made by the grantee for the grant of a lease and adds that prayer has been granted is not a lease. The lease was an antecedant transaction not created by the document. The mere fact that it recites the rent payable for the property which has been already demised does not show that the document itself fixes the rent. A document which is merely an order entitling the grantee to go into possession and to remain in possession on payment of rent year to year is not a lease.

A Kabala, even if it does not effectually pass title, is yet admissible to prove under what alleged title the vendee came into possession and continued in possession. It is at any rate admissible to prove the nature of vendee's possession.

Appeal by the Defendants.

Appeal from an order of remand in a suit for ejectment.

The material facts will appear from the judgment.

Manindra Krishna Ghosh for the Appellants.

Dwijendra Krishna Dutta and Kumar Krishna Dutta for the Respondent.

The judgment of the Court was as follows:—

* Appeal from Appellate Decree No. 193 of 1949, against the decree of S. C. Datta Gupta, Esq., District Judge, Midnapore, in T.A. No. 171 of 1948 dated the 23rd December, 1948 reversing the decree of Keshab Nath Roy Choudhuri, Esq., Munsif, 2nd Court, Midnapore, dated the 23rd of May, 1948.

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1954.

Pitambar Dutta
v.
Dwarka Nath Dutta.

January, 5.

C. N. Das, J.:—This appeal is at the instance of the defendants and is directed against an order of remand made by Mr. S. C. Dutt Gupta, learned District Judge, Midnapore. The plaintiff's case is that out of C.S. Dag No. 1166/2190, the disputed property, .43 acres belonged to one Baidi Laik, that by a registered deed of sale dated 22nd Kartick, 1340 B.S. the plaintiff acquired this property. There was a confirmatory kabala eight years later in 1348 B.S. The plaintiff's further case is that the remaining portion of the said C.S. Dag belonged to one Shibu Jana and this had passed to the plaintiff by certain transactions to which it is not necessary to refer. The defence is that no portion of the disputed property belonged to Baidi Laik or Shibu Jana or that the said properties or other properties were the joint properties of the parties and on partition the defendants have got the same. The trial court upheld the defence and dismissed the plaintiff's suit. On appeal by the plaintiff the judgment and decree of the learned trial Judge has been reversed and the case has been remanded to the trial court for rehearing according to law and on the lines indicated in the judgment. The order of remand is in these terms: "In the face of these circumstances, I am unable to say that the learned court below applied his mind in proper perspective to the facts and circumstances of the case and as such the judgment cannot be allowed to stand. The Hukumnamah (Ex. 4) and the kabala dated 22nd Kartick 1340 B.S. executed by Kenaram De and his wife Kshirode Dasi in favour of the plaintiff should be received into evidence. The learned Munsif should also consider whether Exs. 2/a, 2/c, 2/d and 2/e, which he had expunged, should be received into evidence or not. If he holds that these should not be received into evidence he will give his reasons therefor. He should also take such further evidence as the parties might adduce before him."

Mr. Dutta appearing for the respondent has raised a preliminary objection that the appeal is not competent. In the view I take it is not necessary to deal with this objection.

Mr. Ghosh who appears for the appellant has contended that the Hukumnamah (Ex. 4) being a lease, is not admissible at all. The lower appellate court has observed that Ex. 4 is a memorandum and should be admissible as showing the landlord's

admission to original tenant, Baidi Laik died without an heir and the Bhagchasi of Baidi did not deliver any crops. Mr. Ghosh contends that this view is not correct. I have perused this document Ex. 4. To me it seems that the document Ex. 4 is merely an order entitling the grantee Kinoo Dey to go into possession and to enjoy the same on paying rent. The document *per se* does not fix the terms of the lease. It refers to a prayer made by the grantee for the grant of a lease and adds that that prayer has been granted. The lease was therefore, an antecedent transaction not created by the document in question. The mere fact that it recites the rent payable for the property which was demised already does not show that the document itself fixes the rent. It expressly says:

"তোমার জোত করিবার হুকুম নামা দেওয়া গেল। তুমি হাতজোতে বা ভাগ-জোতে ভোগবান থাকিয়া সন সন খাজনা আদায় দিবে।"

This clearly implies that the document is an order entitling the grantee to go into possession and to remain in possession on paying the rent from year to year. Ex. 4 is therefore admissible in evidence.

Mr. Ghose next contended that the kabala dated 22nd Kartick 1340 B.S. executed by Kenaram is not admissible in view of section 26C of the Bengal Tenancy Act. The question whether the Kabala would effectually pass title or not need not detain us now. The kabala dated 22nd Kartick, 1340 B.S. purports to put the vendee into possession and the kabala is at any rate admissible to prove under what alleged title the vendee continued to possession. If in point of fact the vendor had occupancy right, the document should be ineffective to pass title. But that is not a matter before us now. We are to look to the statements in the kabala. For the reasons given by me, the kabala dated 22nd Kartick 1340 B.S. is at any rate admissible to prove the nature of possession, if any, of the vendees under the kabala. Mr. Ghosh also contended that the documents Ex. 2/a, 2/c, 2/d and 2/e are all inadmissible. The learned Judge has generally said that the learned Munsif should also consider whether Exs. 2/a, 2/c, 2/d and 2/e should be received in evidence or not. This does not necessarily imply that they are admissible. The admissibility of these documents would depend

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on the evidence which may come on the record as a result of the direction given in the order of remand entitling the parties to adduce further evidence. There is therefore, no substance in the objections raised on behalf of the appellant that the court of appeal below did not give proper direction as regards the admissibility of these documents.

G. N. Das, J.

Mr. Ghosh also contended that the trial court had found that the plaintiff's suit was barred by limitation and that this finding has not been considered by the lower appellate court. I do not see any substance in this contention. The plea of limitation was raised by Issue No. 1. It runs as follows: Is the suit barred by limitation? The finding on this issue is as follows "issue No. 1 was not pressed." The question whether the plaintiff is in possession or not will also depend on the evidence which the lower appellate court has directed the trial Judge to take. I do not therefore see any force in the contention raised on behalf of the appellant.

This appeal must accordingly fail and it is dismissed with costs.

P.K.D. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice P. B. Mukharji.

CIVIL.

1954.

February, 15.

SATYA KINKAR DUTT & ANR.

v.

KIRON CHANDRA SINHA & ORS.[1]

Original Side Rules, Chapter XIII—Proceedings on Originating Summons registered as suit—Vendor-purchaser, Summons taken out by intending purchasers—Indian Trusts Act, Sections 70, 71, 73, 46 to 54 and 10—Presidency Towns Insolvency Act, Sections 103A and 119—Bankrupt, if can continue to act as a trustee.

A bankrupt can act as a trustee after the order of adjudication and when the order of adjudication is in operation and has not been annulled insolvency does not discharge a trustee, but provides a ground for his

[1] Suit No. 2699 of 1953.

discharge which can be availed of by appointing a new trustee in his place. Until a new trustee is appointed in his place, the bankrupt trustee continues his office of a trustee. This follows from Sections 70, 71 and 78 of the Indian Trusts Act. Sections 46 to 54 of the Act also lend support to this view. This view is fortified also by the Presidency Towns Insolvency Act. Section 103A of the Presidency Towns Insolvency Act dealing expressly with the disqualifications of an insolvent does not provide that a person who is adjudged an insolvent is by that fact alone disqualified forthwith from holding the office of a trustee. The words used in Section 119 of the Presidency Towns Insolvency Act also point to that conclusion.

When a person becomes insolvent the law divests him of his own properties and puts the management of such properties in the hands of the official assignee. But with regard to properties, in respect of which he is mere trustee, such properties do not vest in the official assignee. It is, however, open to the authors of the trust or the beneficiaries either to allow the trustee to continue as such or to discharge him and appoint a new trustee in his place.

Although the properties owned by the insolvent at the time of the adjudication vest in the official assignee, properties acquired by the insolvent after adjudication and before discharge do not vest in the official assignee immediately on the making of the order of adjudication. The official assignee has, however, a right to intervene in such after-acquired properties on behalf of the insolvent's estate. But if he does not so intervene, the properties are held by the insolvent. The insolvent, therefore, does not suffer from an absolute incapacity to hold property Section 10 of the Trusts Act, therefore, does not debar an insolvent from continuing as trustee.

Beneficiaries can lawfully and validly deal with their beneficial interest in trust properties but not with the legal estate in such properties as the legal estate is vested in the trustees.

When there is no question of a sale being beyond the power of the trustees and when the sale is not impeached on the ground of unreasonableness or malafides under Section 49 of the Trusts Act, the beneficiaries are not necessary parties in effecting the sale.

Suit under Trust and Insolvency Law arising out of an Originating Summons.

The material facts will appear from the Judgment.

A. C. Lahiri with H. N. Ghosh for the Plaintiffs.

Debi De with A. K. Basu for the Defendants.

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February, 15.

The judgment of the Court was as follows:—

P. B. Mukharji, J.:—This Originating Summons raises some interesting and important questions under the insolvency law and the trust law. It is registered as a suit under the Original Side Rules of this Court.

It is a vendor-purchaser summons taken out by the intending purchasers Satya Kinkar Dutt and Satya Sankar Dutt under an Agreement for sale dated the 9th May, 1953. Their vendors, namely, Kiron Chandra Sinha, Jotindra Nath Bose and Pasupati Nath Bose, are among the defendants on this application. The two other defendants in this proceeding are the two trustees Kartick Chandra Mallick and Ganesh Chandra Mallick. The vendors under clause 4 of the Agreement for sale are required to make a "good marketable title."

The facts may be briefly stated to appreciate the points of law that this summons calls for determination.

One Rai Bahadur Debendra Nath Mallick, a Hindu governed by the Dayabhaga School of Hindu Law, executed a Deed of Settlement on the 2nd January, 1925 in respect of diverse properties which *inter alia* included premises Nos. 30A to 30D, Dharamtolla Street, Calcutta, now intended to be sold under the Agreement for sale. The main provisions in the Deed of Settlement were, that the Settlor appointed himself as a first trustee, that the Settlor's wife Brojo Sundari Dassi was to enjoy the properties in suit for her natural life and after her death such properties would vest in specified shares absolutely in the five sons of the Settlor, and that the trustees for the time being would partition such properties among the five sons in accordance with their shares defined in the Deed of Settlement. The Deed of Settlement also provided that after the death of the Settlor, his two male heirs eldest in age then surviving would be the trustees. The Settlor died in February, 1926, and the 4th and the 5th defendants Kartick and Ganesh being the two male heirs eldest in age then surviving, became trustees under the Deed of Settlement, and acted as such in respect of these properties. The Settlor's wife Brojo Sundari Dassi died in May, 1933. The important event for the purpose of this summons

occurred on the 22nd February, 1938 when the defendant trustee Ganesh was adjudicated insolvent. He remained insolvent till the 9th May, 1944 when the order for his adjudication was annulled by this Court. During his insolvency on the 24th April, 1944, the insolvent-defendant Ganesh along with defendant Kartick as trustees sold and transferred the properties in suit to the first three defendants Kiron, Jotin and Pasupati. Apart from this sale by the trustees in 1944, the searches regarding the title of these properties have revealed that prior to such sale, some of the beneficiaries dealt with their interest in some of these properties, as if they were absolute and independent owners, as for instance, a sale by defendant Ganesh of his share to his wife Biraja on the 10th January 1938 just prior to his insolvency, mortgage by defendant Kartick of his share on the 14th March 1938, and mortgage by one Gour, another son of the Settlor.

It was on the 9th May, 1953 that the first three defendants in consideration of a sum of Rs. 76,000/- entered into the Agreement for sale of the properties in suit to the plaintiffs and received Rs. 5,001/- as earnest money thereunder from the plaintiffs. The pivotal question relates to the validity of the title of the vendors who purchased these properties from a trustee who was insolvent at the time.

The first question raised on this summons for determination is:—

(a) Whether the 5th defendant Ganesh was competent to sell as trustee in the conveyance dated the 24th April, 1944 during the period of his insolvency.

This question raises the most important point of this summons. The point is, can a bankrupt trustee act as a trustee after his order of adjudication and when his order of adjudication is in operation and has not been annulled. On an anxious consideration of the different sections of the Indian Trusts Act and the Presidency Towns Insolvency Act, I have come to the conclusion that he can, and the answer to Question (a) on the summons as aforesaid must be in the affirmative. I will, briefly, state my reasons for this conclusion.

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Section 70 of the Indian Trusts Act indicates two circumstances when the office of a trustee is vacated. One, of course, is the death of a trustee, and the other is his discharge from his office as a trustee. Section 71 of the Trusts Act lays down six methods by which a trustee may be discharged from his office and these six methods are expressly stated in the Act to be the "only" methods. Among those six methods described in section 71 of the Act, insolvency of a trustee is not one. Therefore, the insolvency of a trustee will not *ipso facto* discharge him from his office of a trustee. The mere fact of insolvency of a trustee will not discharge him but some further step will have to be taken to effect his discharge. That further step is the appointment of a new trustee in his place. This conclusion is supported by Section 73 of the Trusts Act where it is provided that whenever any person appointed as a trustee "is declared insolvent" a new trustee may be appointed in his place. Insolvency does not discharge him, but provides a ground for his discharge which has to be availed by appointing a new trustee in his place. Until, therefore, a new trustee is appointed in the place of the bankrupt trustee, the bankrupt trustee must be held to continue his office of a trustee. The result appears to follow from the construction of Sections 70, 71 and 73 of the Indian Trusts Act. Chapter V of the Indian Trusts Act dealing with the disabilities of trustees in sections 46 to 54 does not affect this result.

This view is also fortified by the Presidency Towns Insolvency Act and its relevant sections on the point. A reference to Part VIII of the Presidency Towns Insolvency Act will show the penalties and disqualifications of an insolvent in cases governed by that Act. But that Chapter of the Statute and specially section 103-A of the Presidency Towns Insolvency Act appearing therein and dealing expressly with the disqualifications of an insolvent make no provision for saying that a person who is adjudged an insolvent is by that fact alone of his adjudication disqualified forthwith from holding his office of a trustee. There are other indications in the Presidency Towns Insolvency Act which support the same conclusion. Section 119 of that Act makes an express reference to the case of insolvency of a trustee under the Indian Trustees Act, 1866 because the Trustees Act, unlike the Trusts Act, does not itself provide for the case of insolvency of a trustee under the Trustees Act. It

provides that in that event section 35 of the Trustees Act will have effect so as to authorise the appointment of a new trustee in substitution for the insolvent. The words used in section 119 of the Presidency Towns Insolvancy Act are, however, significant pointers to the conclusion that the insolvency by itself will not discharge the trustee. Such words are "if it appears expedient to do so" and "whether voluntarily resigning or not." These words imply that there may be cases where the trustee has not voluntarily resigned after the order adjudicating him insolvent, thereby creating the eventuality of his continuance as a trustee and that in case of such adjudication, a new trustee is not appointed as a matter of course but only if to the Court "it appears expedient to do so." The present case before me is not that of a trustee under the Trustees Act, and the reference to section 119 of the Presidency Towns Insolvency Act is made only to show, first, that there is no inherent legal incapacity in the bankrupt trustee to continue to act as trustee, and, secondly, to show that implicit in the scheme of the Presidency Towns Insolvency Act is the recognition that something more than the order adjudicating a trustee insolvent is necessary to discharge a trustee. What is implicit in the Insolvency Act is made explicit in the Indian Trusts Act whose provisions I have already discussed. In other words, a trustee when he suffers insolvency incurs an incipient disqualification which does not mature to disrupt his tenure as trustee until his discharge by appointment of a new trustee in his place.

This conclusion is not a result which at first sight appears to be commendable, because an insolvent whom the law considers incapable of managing his own properties and, therefore, divests him, should still permit him to manage somebody else's property in trust. But that appears to be the law. What appears at first sight to be unreasonable, on a closer consideration yields some justification. When a person becomes insolvent, the law divests him of his own properties because they are made beholden to answer for his debts and in order to do so, the management of his own properties is taken out of his hands and put in the hands of the Official Assignee. But with regard to trust properties, they are not his own properties and they do not vest in the Official Assignee, and the law leaves it open to the authors of the trust or the beneficiaries the right to consider

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whether even in insolvency they should continue their trustees but ensures that should they choose to discharge him, the law would offer the fact of the insolvency of the trustee as a good ground for appointment of a new trustee in his place. The apparent incongruity of the situation was seen by Jessel, M. R. in *Re: Barkar's Trust* (1) where the learned Master of the Rolls in describing the duty of the Court to remove a bankrupt trustee expressly refers to special circumstances where a trustee can continue as a trustee although he has become bankrupt in these terms:—

> "In my view, it is the duty of the Court to remove a bankrupt trustee who has trust money to receive or deal with so that he might not misappropriate it. There may be exceptions in special circumstances to that general rule; and it may also be that where a trustee has no money to receive, he ought not to be removed merely because he has become bankrupt; but I consider the general rule to be as I have stated. The reason is obvious. A necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy; and besides a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people."

The clear reference by the learned Master of the Rolls to the possibility of a bankrupt trustee continuing as a trustee even in special circumstances at least shows that there is no inherent legal infirmity or incapacity in a bankrupt trustee to continue as trustee until he is discharged by the appointment of a new trustee in his place.

Mr. Lahiri for the applicant-plaintiffs has argued the case with great fairness and has drawn my attention to section 10 of the Indian Trusts Act which says, "Every person capable of holding property may be a trustee." His argument is that an insolvent is not capable of holding property. It is contended that the capacity to hold property is the indispensable qualification of a Trustee and if he loses that qualification, and in this case it is suggested that he has lost it by insolvency, then he can no longer be said to remain a trustee. This argument requires a critical examination.

(1) (1876) 1 C.D. 43.

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The basic assumption in this argument is that the insolvent suffers from an absolute incapacity to hold property. That assumption is not, in my judgment, sound. It is true that under the Presidency Towns Insolvency Act the property of the Insolvent vests in the Official Assignee on the making of the order of adjudication and such property becomes divisible among his creditors. Of course, the only property that vests in the Official Assignee is the property of the insolvent and not other persons' property which he held in trust at the time. It is also plain that such vesting of the property in the Official Assignee does not affect the power of any secured creditor to realise or otherwise deal with his security. That seems to be the broad effect of section 17 of the Presidency Towns Insolvency Act While this relates to property of the insolvent at the point of time when he is adjudicated, namely, his present properties, the law also in certain circumstances provides for avoidance of voluntary transfers and preference with regard to the insolvent's past dealings as in sections 55 and 56 of that Act. But with regard to future property or after-acquired property, the law appears to be more tender to the insolvent than with regard to his past dealings and present property, present at the time of the adjudication. Property acquired by the insolvent after adjudication and before discharge does not vest in the Official Assignee immediately on the making of the order of adjudication. The Official Assignee has a right to intervene in such after-acquired property on behalf of the insolvent's estate. But if he does not so intervene, then the property is held by the insolvent and he is capable of holding such property. This result has been produced by a long line of inter-pretation and series of cases beginning with *Kerakoose* v. *Brookes* (1), *Mitter* v. *Deb* (2), *Dasarathy* v. *Mahamulya* (3), and ending with the more recent pronouncements as *Re: Srinivasa Rao's case* (4) and an older decision of the same High Court in *Sriramulu Naidu* v. *Andalammal* (5). The inspiration for the doctrine that the insolvent is capable of holding such after-acquired property until intervention by the Official Assignee appears to be the English decision in *Herbert* v. *Sayer* (6). It has been held in India that an in-

(1) (1860) 8 Moo. 1 I.A. 339. (2) (1882) I.L.R. 8 Calc. 556.
(3) (1930) I.L.R. 47 Calc. 961. (4) [1947] A.I.A. Mad. 187.
(5) (1906) I.L.R. 30 Mad 145. (6) (1844) 5 Q.B 965.

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solvent can validly mortgage his after-acquired property or can validly assign a decree obtained by him for personal services rendered after adjudication if such transfers were made before the intervention by the Official Assignee. Indeed it has also been held that unless the Official Assignee has intervened it is competent for the insolvent, his legal representatives and his assigns even to maintain a suit for the recovery of after-acquired immovable property or for any other relief in respect thereof against a stranger and the Official Assignee is not a necessary party to such suit. In other words, the insolvent can assert a title to after-acquired property and hold the same against the whole world except the Official Assignee. The position, however, is different under the Provincial Insolvency Act where even the after-acquired property vests in the Receiver. This general discussion is intended to show that in any event there is no complete destruction of the insolvent's legal capacity to hold property such as to make him legally incompetent by virtue of his insolvency alone to continue as a trustee. Viewed in that light, section 10 of the Trusts Act cannot, in my judgment, be construed as having the effect that the moment a trustee becomes insolvent he ceases to be a trustee by the very order of his adjudication. Mr. Debi De appearing for the trustees has contended that the proper meaning to be attributed to section 10 is that the trustee must be originally capable of holding property but he need not continue to have such capacity. In other words, his argument is that the capacity to hold property relates to the point of time when a person becomes a trustee and does not mean continuing capacity after he has become a trustee. Having regard to the view that I have already taken, I consider it unnecessary to decide that general point of construction which Mr. De has raised about the meaning of the words "capable of holding property" in section 10 of the Trusts Act for I am concerned only with the position of an insolvent. If section 10 of the Trusts Act meant an immediate disqualification of the trustee to act as such on the very making of the order of his adjudication, then such a construction will militate against the provisions of sections 70, 71 and 73 of the Indian Trusts Act which I have discussed and from which I deduce that the trustee may continue to act as a trustee even after his bankruptcy until he is discharged by the appointment of a new trustee in his place.

I, therefore, hold that an order of adjudication of a trustee does not by itself discharge him, and the bankrupt trustee continues as a trustee until he is discharged by the appointment of a new trustee in his place. For the reasons I have recorded above, I answer question (a) raised on this summons in the affirmative.

The next question raised on this summons for determination is:—

(b) Whether the beneficiaries could lawfully and/or validly deal with their interest in the said property before the sale of the same on the 24th April, 1944 by the trustees.

The answer to this question depends partly on the provisions of the Deed of Settlement. The Deed provides conveyance of the properties in suit to the Settlor himself as trustee "for and during the term of his natural life upon the trust and subject to the declaration and conditions hereinafter declared and mentioned." Clause 3 of the Deed of Settlement is in the following terms:—

"That after the death of the Settlor, his two male heirs eldest in age then surviving shall be the trustees of the said estate and carry out the terms and conditions of the herein created trust."

The title to the properties, therefore, by virtue of these provisions in the Deed of Settlement vests in the trustees. Among the duties and trusts declared by the Deed of Settlement to be carried out by the trustees, the following provisions are material for the purpose of determining the question. They are:—

(i) "After the decease of the Settlor's said wife, the trustees shall in the first instance have power to partition and divide the said properties, after having them valued by a competent Engineer in proportion hereinafter mentioned, viz., the Settlor's eldest son Kertick Charan Mallick will get absolutely 5 annas share thereof, the Settlor's second son Ganesh Chandra Mallick will get absolutely 2 annas 9 pies share thereof, the Settlor's third son Mahesh Chandra Mallick will get absolutely 2 annas 9 pies share thereof, the Settlor's fourth son Gour Chandra Mallick will get absolutely 2 annas 9 pies share thereof, and the Settlor's 5th son Hari Charan Mallick will get absolutely 2 annas 9 pies share.

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thereof (ii) "or in the alternative if the aforesaid partition be not convenient, the trustees shall be at liberty to have the aforesaid properties valued by a proper and competent Engineer and sell either by public sale or private contract the aforesaid premises at a price not less than a reserve price to be fixed by the aforesaid Engineer appointed by the trustees and divide the net sale proceeds" according to the shares mentioned above. (iii) "It is hereby further provided that pending the aforesaid partition or sale whatever the case may be, the trustees shall have full power and absolute authority to manage the aforesaid properties in any manner they think fit and proper and divide the net income realised therefrom amongst the Settlor's aforesaid five sons" in the proportions mentioned above.

On a construction of these relevant provisions of this Deed of Settlement, I am of the opinion that the legal estate vested in the trustees appointed thereunder. I hold, therefore, that the beneficiaries could not in those circumstances deal with the legal estate in the said properties. Any attempt to deal with the same by the beneficiaries is, therefore, void. But the beneficiaries, however, could, in my opinion, deal with their beneficial interest only. In my view, the terms of the Deed of Settlement make it clear that until the distribution of the properties by the trustees in the manner declared by the provisions of the Deed which I have just quoted above, the absolute shares, namely, 5 annas for Kartick, and 2 annas 9 pies for the other 5 sons, could not be disposed of by the son beneficiaries I, therefore, answer question (b) raised on this summons by holding that the beneficiaries could lawfully and validly deal with their beneficial interest in the said properties but not their legal estate in such properties as it remained vested in the trustees. The next question raised in this summons for determination is:—

(c) "Whether the beneficiaries are necessary parties in effecting the sale between the plaintiffs and the first three defendants and whether they should be joined in the conveyance as confirming parties."

The answer to this question follows from the answer to the previous question. I am of the opinion that the legal interest in the said properties is completely represented by the trustees under the Deed of Settlement and by the express terms thereunder, the trustees have "full power and absolute authority to

manage the aforesaid properties in any manner they think fit and proper" and as there is no question of the sale being beyond the power of the trustees and as no question of its impeachment on any ground of unreasonableness or *mala fides* under section 49 of the Trusts Act is even alleged, it is not necessary to join the beneficiaries. I, therefore, answer the question accordingly.

The next question raised on this summons for determination is:—

(d) "Did the sale by the 4th and 5th defendants as trustees on the 24th April, 1944 pass a valid and lawful title in favour of the first three defendants in view of the dealings by the beneficiaries of their interests as aforesaid?"

This also is consequential. The answer to this question is in the affirmative because the trustees had all the legal title in themselves. I have already said that no dealing by the beneficiaries in this case on the facts could affect the legal title which remained with the trustees at the material time.

The next question asked on this summons for determination is:—

(e) "If it be held that the defendant Ganesh was not competent to act as trustee, being insolvent on the material date of sale, was the sale dated the 24th April, 1944 by the defendant Kartick alone valid and legal?

Having regard to the opinion I have already expressed that defendant Ganesh was competent to act as a trustee because he was not discharged by the appointment of a new trustee in his place, this question does not arise for an answer. I therefore, do not answer this question.

This disposes of the different questions asked on this Originating Summons. Having regard to the circumstances in this case, I think the best order for costs will be that each party will bear his own costs.

Mitter & Ganguly: Solicitors for the Plaintiffs.

P. K. Mitter & G. C. Chundra & Co. Solicitors of the Defendants.

P.K.D.

Suit disposed of and bankrupt trustee held competent to continue as trustee.

APPELLATE CIVIL.

Before Mr. Justice K. C. Das Gupta and Mr. Justice Debabrata Mookerjee.

CIVIL

1954

January, 18.

SUNIL KUMAR BOSE

v.

AJIT KUMAR BOSE & ORS.*

Indian Railway Establishment Code—Whether the provision in Rule No. 1336 as regards the manner in which the amount in Provident Fund is to be disposed of is a condition of service—Whether the rule is intra-vires—Whether the rule is inconsistant with the Provident Fund Act.

Rules Nos 1301 to 1339 in Chapter XIII of Volume I of Railway Establishment Code, which are State Railway Provident Fund Rules, were framed by the Governor-General in Council under Sub-section (3) of Section 241 of the Government of India Act, 1935. The provisions that there will be a Provident Fund for employees, that the employees will have to make contributions thereto and the employer also will make contributions are conditions of service. The manner in which such contributions will be disposed of on the cessation of the employee's service or on his death, as laid down in Rule No. 1336 of the above rules, is also a condition of service. Therefore the rule is *intra vires* of the Governor General in Council.

Chapter XIII of the Indian Railway Establishment Code is applicable to a Railway employee, who has not been permitted to remain under the rules of the Burma Railway Company.

Sections 3 and 4 of the Provident Funds Act do not provide that major sons are entitled to get the sums standing to the credit of a deceased subscriber equally with minor sons. The provisions of Rule No. 1336 are therefore not contrary to any provision of the Provident Funds Act and are therefore valid rules to which the Courts of Law have to give effect.

On a plain reading of the Rule it is quite clear that where a share has to be determined, the provisions for payment of the sums standing to a subscriber's credit will be subject to the proviso that no share shall be payable to (i) sons who have attained legal majority, (ii) sons of a deceased son who have attained legal majority, (iii) married daughters whose husbands are alive and (iv) married daughters of a deceased son whose husbands are alive. It is further provided that these provisos will be applicable only if there is any member of the family other than those specified above. "Family" is defined in rule 1302 (6).

* Appeal from Original Decree against the decree of Sri H. C. Ghose, Additional Subordinate Judge, Fourth Court, Alipore, dated the 20th September, 1948.

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Sunil Kumar Bose v. Ajit Kumar Bose.

January, 18.

Suit for Declaration.

Appeal by the Defendant.

The material facts will appear from the judgment.

Rishindra Nath Saikar, Sailendra Nath Banerjee and Nirmal Chandra Chowdhury for the Appellant.

Apurba Charan Mukherjee and Ganga Narayan Chandra for the Respondents.

The judgment of the Court was as follows:—

K. C. Das Gupta, J.:—The dispute in this case is over a total sum of Rs. 11,593-10-0 of which Rs. 9,500 was the amount standing to the credit of Sailendra Nath Bose, a Railway servant, in the Railway Provident Fund, Rs. 1,820 also standing to his credit as the special contribution thereto, Rs. 183-10-0 due to him as arrears of his salary and dearness allowance, etc. and Rs. 90 on account of the value of his share in the Employees' Co-operative Credit Society. It is admitted now that after the death of Sailendra Nath Bose, Ajit Kumar Bose, Ranjit Kumar Bose and Sunil Kumar Bose jointly applied to the Railway Authorities for payment of these monies but were informed by the Railway Authorities that the Provident Fund money was, under the rules applicable to the deceased Railway servant as regards the Provident Fund, payable only to the minor sons. It was after this that the two sons Ajit and Ranjit started the present action in which they alleged that Sunil was not the son of their father at all and asked for a declaration that they two were the only sons of Sailendra Nath Bose and were as such entitled to get all the monies mentioned above. An alternative case was however also made the averment of which in the plaint is in these words:

> "Conceding but not admitting that the defendant No. 1 is a son of the said Sailendra Nath Bose @ S. N. Bose by his second wife the Defendant No. 1 would not be, at any rate, entitled to get more than one third of all the monies mentioned in Schedule "A" hereto and the plain-

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tiffs would be entitled to get the remaining two-thirds of the same under the Provident Funds Act and the Rules framed thereunder."

On the basis of this averment the alternative prayer was made that if the court held that Defendant No. 1 was also a son of the deceased, a declaration should be given that the plaintiffs and the Defendant No. 1 are entitled to get the monies mentioned in equal shares.

It appears that at the time of the trial this unfortunate and scandalous allegation that Sunil Bose was not the son of Sailendra Nath Bose was given up and the plaintiffs wanted only a declaration on the basis that Sunil was also a son of the deceased, that they were entitled to two-thirds of the money and Sunil to the remaining one-third.

The learned Subordinate Judge held that the rule of the Provident Fund so far as it restricts payment to the minor sons only is invalid and that under the general provisions of the Provident Funds Act all the sons and daughters would get the deposited amount according to their respective shares. The rules to which the Subordinate Judge refers were framed by the Governor-General in Council under Sub-section (2) of section 241 of the Government of India Act, 1935. They are published as part of the Indian Railway Establishment Code and are numbered 1301 to 1339 of the first volume of the Code. Rule No. 1336 is in these words.

"1336. Subject to the provisions of Rule 1337, on the death of a subscriber before the amount standing to this credit has become payable, or where the amount has become payable, before payment has been made—

(i) The amount of the special contribution credited to the subscriber's account under Rule 1314 shall become payable to the widow or widows or and dependent children of the deceased subscriber in such shares as the Controlling Officer may determine.

(ii) If a nomination made by the subscriber in accordance with Rule 1334 subsists the amount standing to his credit in

the Fund, excluding any amount which becomes payable under clause (i), or that part thereof to which the nomination relates, shall become payable to his nominee or nominees in accordance with such nomination; provided that if the amount exceeds rupees five thousand and the nominee is not a dependent, it shall be payable only on production by the nominee of probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or a succession certificate entitling him to receive payment of the amount;

(iii) If no nomination subsists, or if the nomination relates only to a part of the amount standing to his credit in the fund, the whole amount or the part thereof to which the nomination does not relate, as the case may be, shall, subject to the provisions of clause (i), become payable to the members of his family in equal shares, and if there are no such members shall become payable—

(a) If the amount does not exceed rupees five thousand, to any person appearing to the Accounts Officer to be entitled to receive it;

(b) If the amount exceeds rupees five thousand, to any person who produces probate or letters of administration evidencing the grant to him of administration of the estate of the deceased or a succession certificate entitling him to the payment of the amount.

Provided that no share shall be payable to—

(1) sons who have attained legal majority;

(2) sons of a deceased son who have attained legal majority;

(3) married daughters whose husbands are alive;

(4) married daughters of a deceased son whose husbands are alive;

(5) if there is any member of the family other than those specified in clauses (1), (2), (3) and (4).

Provided further that the widow or widows and the child or children of a deceased son shall receive between them in equal

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parts only the shares which that son would have received if he had survived the subscriber and had not attained the age of legal majority at the time of the subscribers' death."

It is necessary to consider first of all an argument which does not appear to have been raised before the court below but has been raised before us by Mr. Mukherjee on behalf of the respondents that the provision in Rule 1336 as regards the manner in which the amount standing to the credit of an employee in his provident Fund would be disposed of is not a condition of service and consequently the framing of such a rule was beyond the authority given to the Governor-General under section 241 of the Government of India Act, 1935. In my judgment there is no substance in this contention. The provisions that there will be a Provident Fund for employees, that the employees will have to make contributions thereto and that the employer also will make contributions are clearly conditions of service. How it can be said that the manner in which those contributions would be disposed of on the cessation of the employee's service or on his death are not conditions of service, I am unable to understand, I am clearly of opinion that the rules are *intra vires* the Governor-General in Council.

Both parties appear to have proceeded before the Court below on the basis that if any rules apply to the Provident Fund they are the rules that appear in Nos. 1331 to 1339 in the Indian Railway Establishment Code. These rules were framed in 1940. It has been sought to be argued before us by Mr. Mukherjee that the evidence on the record does not clearly show that these rules are applicable. It has been provided in Chapter XIII that "the rules in this chapter are not applicable to those railway servants whose services were taken over by the Central Government from the Assam Bengal, Bengal Nagpur, Bombay, Baroda and Central India, Burma, East Indian, Great Indian Peninsula, Madras and Southern Maharatta and South Indian Railway Companies and who have been permitted to remain under the rules of those Companies as amended from time to time." It is admitted before us that the Central Government took over the administration of the East Indian Railway from the 1st of January, 1925. In paragraph 1 of the plaint there is an averment, the correctness of which does not appear to have

been disputed by the defendants that Sailendra Nath Bose served in the Eastern Bengal Railway as a wardkeeper from 1918 to 1924; then he joined the C.I.C. Railway and served there for about two years as a stock-holder and subsequently as D.S.K.P., thereafter he served in Burma Railway for sometime, then his services were requisitioned by the East Indian Railway where he served in different capacities and was ultimately posted as wardkeeper at Jamalpore." It seems clear from this that the East Indian Railway had already been taken over by the Central Government before he joined services there and that his services were requisitioned by the Central Government for the East Indian Railway at a time when he was serving in the Burma Railway. If, therefore, it is shown that he had been permitted to remain under the rules of the Burma Railway, the conclusion would follow that he would not be governed by the rules in Chapter XIII of the Code. Not only has no attempt been made by the plaintiffs to show that Sailendra Nath Bose had been permitted to remain under the rules of the Burma Railway but no suggestions were even made that he was so permitted. As I have already indicated, the plaintiffs and their lawyers appear to have proceeded on the basis that the rules applicable to Sailendra Nath Bose are the rules in Chapter XIII.

In absence of any evidence to show that Sailendra Nath Bose had been permitted to remain under the rules of the Burma Railway Company, it is in these circumstances proper for us to proceed on the basis that he had not been permitted and the rules in Chapter XIII of the Code were applicable to him.

The learned Subordinate Judge seemed to be of opinion that the provisions in rule 1336 are contrary to the provisions of the Provident Funds Act as contained in section 4 of the Act. The relevant portion of section 4 provides that where the subscriber is dead payment of the sum standing to his credit shall be made to the dependent in whom it has vested under the provisions of section 3. Section 3 provides *inter alia* that a sum standing to the credit of a subscriber at the time of his decease and under the rules of the Fund to any dependent of the subscriber, shall, subject to any deduction authorised by this Act, vest in the dependent. It has been held in the case of

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Nidhusudan Mukherjee v. *Bibhabati Debi* (1), that the major child is also a dependent within the meaning of section 4. The learned Subordinate Judge seems to infer from this that sections 3 and 4 provide that major sons equally with minor sons are entitled to get the sums standing to the credit of the subscriber. If this was the effect of sections 3 and 4 that would have been a good ground for holding that the rules in so far as they make contrary provisions will not prevail. In thinking, however, that sections 3 and 4 provide that a major child is also entitled to get a share, the learned Subordinate Judge appears to have wholly ignored the important words in sub-section (2) of section 3 . . . . . "payable under the rules of the Fund to any dependent." It is only if under the rules of the Fund to which the subscriber was subject the sum is payable to any dependent that it vests in him. If under the rules it does not vest in him, the provisions mentioned above of sections 3 and 4 cannot create any right in him. The Act itself contemplates rules being framed in these matters and has not provided that the Governor-General would not have any power to make rules that major children would not get a share.

I can see no justification for holding that the provisions of Rule No. 1336 are invalid. They are, in my opinion, valid rules to which the courts of law have to give effect. On a plain reading of the rules it is quite clear that where a share has to be determined, the provisions for payment of the sums standing to a subscriber's credit will be subject to the proviso that no such share shall be payable to (1) sons who have attained legal majority; (2) sons of a deceased son who have attained legal majority; (3) married daughters whose husbands are alive and (4) married daughters of a deceased son whose husbands are alive. It is further provided that these provisos will be applicable only if there is any member of the family other than those specified above. Family has been defined in Rule 1302 (6) to mean in the case of a male subscriber "the wife or wives and children of the subscriber, and the widow, or widows, and children of a deceased son of the subscriber."

The net effect, therefore, is that as there was admittedly no subsisting nomination by the subscriber, the amount standing to

(1) (1940) 44 C.W.N. 407.

the subscriber's credit in the Fund is payable to the members of his family in equal shares leaving out, for the calculation of the shares, the sons who have attained legal majority. As the plaintiffs have attained legal majority nothing is payable to them under the provisions in Rule 1336 and consequently nothing is payable to them under the Act.

As regards the amount of the special contribution also the Controlling Officer has, in determining the shares, to give effect to the proviso that no share shall be payable to sons who have attained legal majority. Consequently the two plaintiffs are not entitled to any share of the amount of the special contribution.

My conclusion, therefore is that the learned Subordinate Judge was wrong in holding that the plaintiffs are entitled to any share of either Rs. 9,500 as standing to the credit of Sailendra Nath Bose in the Provident Fund money or Rs. 1,820 which represents the special contribution to the Provident Fund. They are, however, entitled to two-thirds of the amounts of Rs. 183-10-0 due to Sailendra Nath Bose at the time of his death as arrears of his salary and dearness allowance, etc. and Rs. 90, the value of his share of the Employees' Co-Operative Credit Society.

I would, therefore set aside the judgment and decree passed by the court below as regards the plaintiff's claim to any share of Rs. 9,500 and Rs. 1,820 mentioned above. I would, therefore, allow the appeal in part and order that the plaintiffs' suit be decreed in part only as regards the two-thirds share in Rs. 183-10 and Rs. 90 but his prayer be dismissed as regards the remaining items. As the defendants have substantially succeeded in the appeal they will be entitled to their costs in both the Courts.

Hearing fee assessed at five Gold Mohurs.

Debabrata Mookerjee, J.:—I agree.

P.K.D. *Appeal allowed.*

SUPREME COURT.

Before Mr. M. Patanjali Shastri, Chief Justice, Mr. Justice Mehr Chand Mahajan, Mr. Justice Sudhi Ranjan Das, Mr. Justice Ghulam Hasan, and Mr. Justice B. Jagannadhadas.

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December, 11.

THE STATE OF WEST BENGAL
v.
BELA BANERJEE AND OTHERS.*

Constitution—Article 31—Compulsory acquisition of property—"Public purpose," a necessary condition of acquisition—"Public purpose," whether a justiciable issue—Compensation payable to owner—Principle of determining compensation—Whether it is a justiciable issue. Constitution—Article 31(6)—A law passed within 18 months before the commencement of the Constitution—Such a law is hit by Article 31(2) unless certified by the President within 3 months—Acts passed beyond 18 months are saved by Article 31(5) of the Constitution.

Article 31(2) of the Constitution makes the existence of a public purpose a necessary condition of acquisition, and the existence of such a purpose as a fact must be established objectively. As such any provision making the declaration of the Government conclusive as to the public nature of the purpose of the acquisition must be held unconstitutional.

While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court.

"Compensation" taken by itself must mean a full and fair money equivalent, and any attempt to fix the market value as the ceiling on compensation without reference to the value of the land at the time of acquisition is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of Article 31(2).

* Supreme Court Civil Appeal No. 123 of 1952 from the Judgment and Order dated the 22nd day of March 1951 of the High Court of Judicature at Calcutta (*Harries C.J. and Banerjee J.*) in Reference No. 2 of 1951 in Civil Rules Nos. 20 and 24 of 1950.

Article 31(6) is intended to save a State law enacted within 18 months before the commencement of Constitution provided the same is certified by the President, while Article 31(5) saves all existing laws passed more than 18 months before January 26, 1950.

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Appeal by the Defendant.

Suit for declaring the West Bengal Land Development and Planning Act 1948 void and unconstitutional.

The material facts will appear from the judgment.

M. C. Setalvad, Attorney-General for India with N. C. Chatterjee, Senior Advocate, and B. Sen for the Appellant.

A. C. Gupta and S. P. Ghosh for the Respondents Nos. 1, 2 and 3.

M. C. Setalvad, Attorney-General for India and G. N. Joshi for the Intervener (The Union of India).

The judgment of the Court was as follows:—

Patanjali Sastri, C.J.:—This is an appeal from a judgment of the High Court of Judicature at Calcutta declaring certain provisions of the West Bengal Land Development and Planning Act, 1948 (hereinafter referred to as the "impugned Act") unconstitutional and void.

The impugned Act was passed on October 1, 1948, primarily for the settlement of immigrants who had migrated into the Province of West Bengal due to communal disturbances in East Bengal, and it provides for the acquisition and development of land for public purposes including the purpose aforesaid. A registered Society called the West Bengal Settlement Kanungoe Co-operative Credit Society Ltd., Respondent No. 4 herein, was authorised to undertake a development scheme, and the Government of the State of West Bengal, the appellant herein, acquired and made over certain lands to the Society for purposes of the development scheme on payment of the estimated cost of the acquisition. On July 28, 1950, the Respondents 1 to 3, the owners of the lands thus acquired, instituted a suit in the Court

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of the Subordinate Judge, II Court at Alipore, District 24-Parganas, against the Society for a declaration that the impugned Act was void as contravening the Constitution and that all the proceedings taken thereunder for the acquisition aforesaid were also void and of no effect and for other consequential reliefs. The State of West Bengal was subsequently impleaded as a defendant. As the suit involved questions of interpretation of the Constitution, Respondents 1 to 3 also moved the High Court under article 228 of the Constitution to withdraw the suit and determine the constitutional question. The suit was accordingly transferred to the High Court and the matter was heard by a Division Bench (Trevor Harries C.J. and Banerjee J.) who, by their final judgment, held that the impugned Act as a whole was not unconstitutional or void save as regards two of the provisions contained in section 8 which, so far as it is material here, runs as follows:

> A declaration under section 6 shall be conclusive evidence that the land in respect of which the declaration is made is needed for a public purpose and, after making such declaration, the Provincial Government may acquire the land and thereupon the provisions of the Land Acquisition Act, 1894 (hereinafter in this section referred to as the said Act), shall, so far as may be, apply:
>
> Provided that—
>
> (b) in determining the amount of compensation to be awarded for land acquired in pursuance of this Act the market value referred to in clause first of sub-section (1) of section 23 of the said Act shall be deemed to be the market value of the land on the date of publication of the notification under sub-section (1) of section 4 for the notified area in which the land is included subject to the following condition, that is to say—
> if such market value exceeds by any amount the market value of the land on the 31st day of December 1946, on the assumption that the land had been at that date in the state in which it in fact was on the date of publication of the said notification, the amount of such excess shall not be taken into consideration.

The provision making the declaration of the Government conclusive as to the public nature of the purpose of the acquisition and the limitation of the amount of compensation so as not to exceed the market value of the land on December 31, 1946, were declared *ultra vires* the Constitution and void.

The Attorney-General, appearing for the appellant, rightly conceded that inasmuch as article 31(2) made the existence of a public purpose a necessary condition of acquisition, the existence of such a purpose as a fact must be established objectively, and the provision in section 8 relating to the conclusiveness of the declaration of Government as to the nature of the purpose of the acquisition must be held unconstitutional but he contended that the provision was saved by article 31(5) of the Constitution which provides: "Nothing in clause (2) shall affect—(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or.....". Clause (6) reads thus:

> Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

It was argued that the impugned Act having been passed within 18 months before the commencement of the Constitution and not having been submitted to the President for his certification, it was a law to which the provisions of clause (6) did not apply and, therefore, as an existing law, the impugned Act was not affected by clause (2) of that article. The argument is manifestly unsound. Article 31 (6) is intended to save a State law enacted within 18 months before the commencement of the Constitution provided the same was certified by the President, while, article 31 (5) saves all existing laws passed more than 18 months before the commencement of the Constitution. Reading the two clauses together, the intention is clear that an

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existing law passed within 18 months before January 26, 1950 is not to be saved unless it was submitted to the President within three months from such date for his certification and was certified by him. The argument, if accepted, would reduce article 31 (6) to a meaningless redundancy.

The only serious controversy in the appeal centred round the constitutionality of the "condition" in proviso (b) to section 8 limiting the compensation payable so as not to exceed the market value of the land on December 31, 1946. The Attorney-General, while conceding that the word "compensation" taken by itself must mean a full and fair money equivalent, urged that, in the context of article 31 (2) read with Entry No. 42 of List III of the Seventh Schedule, the term was not used in any rigid sense importing equivalence in value but had reference to what the legislature might think was a proper indemnity for the loss sustained by the owner. Article 31 (2) provides:

> No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

and Entry 42 of List III reads thus:

> Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given.

It is argued that the term "compensation" in Entry 42 could not mean full cash equivalent, for then, the power conferred on the legislature to lay down the principles on which compensation is to be determined and the form and the manner

in which such compensation is to be given would be rendered nugatory. On the other hand, the Entry showed that the compensation to be "given" was only "such compensation" as was determined on the principles laid down by the law enacted in exercise of the power, and, as the concluding words used in article 31 (2) are substantially the same as in the Entry, the Constitution, it was claimed, left scope for legislative discretion in determining the measure of the indemnity.

We are unable to agree with this view. While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the court. This, indeed, was not disputed.

Reference was made to certain Australian cases where the opinion was expressed that the terms of compulsory acquisition of property were matters of legislative policy and judgment. The decisions largely turned on the absence of any constitutional prohibition in regard to deprivation of private property without compensation as in the Fifth Amendment of the American Constitution and on the use of the words "just terms" instead of "compensation" in sevtion 51 (xxxi) of the Commonwealth Constitution which conferred power on the Paliament to make laws with respect to "the acquisition of property on just terms from any State or person ..." [cf. *Grace Brothers Pty. Ltd.* v. *The Commonwealth* (1)]. Those decisions therefore, are of no assistance to the appellant here.

Turning now to the provisions relating to compensation under the impugned Act, it will be seen that the latter part of

(1) (1946) 72 C.L.R. 269.

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the proviso to section 8 limits the amount of compensation so as not to exceed the market value of the land on December 31, 1946, no matter when the land is acquired. Considering that the impugned Act is a permanent enactment and lands may be acquired under it many years after it came into force, the fixing of the market value on December 31, 1946 as the ceiling on compensation, without reference to the value of the land at the time of the acquisition is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of article 31 (2). The fixing of an anterior date for the ascertainment of value may not, in certain circumstances, be a violation of the constitutional requirement as, for instance, when the proposed scheme of acquisition becomes known before it is launched and prices rise sharply in anticipation of the benefits to be derived under it, but the fixing of an anterior date, which might have no relation to the value of the land when it is acquired, may be, many years later, cannot but be regarded as arbitrary. The learned Judges below observe that it is common knowledge that since the end of the war, land, particularly around Calcutta, has increased enormously in value and might still further increase very considerably in value when the pace of industrialisation increases. Any principle for determining compensation which denies to the owner this increment in value cannot result in the ascertainment of the true equivalent of the land appropriated.

We accordingly hold that the latter part of proviso (b) to section 8 of the impugned Act which fixes the market value on December 31, 1946 as the maximum compensation for lands acquired under it offends against the provisions of article 31 (2) and is unconstitutional and void. The appeal is dismissed with costs.

P. K. Bose: Agent for the Appellant.

S. C. Banerjee: Agent for the Respondents.

G. H. Rajadhyaksha: Agent for the Intervener.

S.G.P. *Appeal dismissed with costs.*

APPEAL FROM ORIGINAL CIVIL.

Before Mr. P. B. Chakravarti, Chief Justice and
Mr. Justice S. R. Das Gupta.

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December, 17.

BUKHTIARPUR BIHAR LIGHT RAILWAY CO. LTD.

v.

UNION OF INDIA & ANR.*

Indian Companies Act—Winding-up application by a creditor—Inability of the Company to pay off its creditor—Distinction between inability and failure to pay—Disappearance of substratum of the Company, whether a creditor may press it as a ground for winding up.

Indian Companies Act—Section 163(1) (i)—Notice of demand by a creditor —Notice delivered at a place other than the company's registered office is invalid.

Where the assets of the company is admittedly more than its liabilities, it cannot be pressed that the company is unable to pay its creditors. It may be a case where the company was failing and neglecting to pay.

If inspite of being possessed of sufficient funds, the company resorted to device or obstruction in order to avoid the claims of creditors, such a case, in certain circumstances, may amount to a case of inability to pay the debts. But it cannot be held to be a general rule.

A winding up order may be a form of equitable execution but there is no equity in making such order when the debt of a creditor is not in peril, although the substratum of the company may be gone, and when matters remain outstanding which can best be attended to in the interest of the share holders by the company functioning as a company through its directors.

If a notice of demand is to operate as a valid statutory notice under Section 163(1) (i) of the Indian Companies Act, it would have to be delivered to the company at its registered office.

Appeal by the Defendant Company against a winding-up order.

Application by a Creditor for winding-up.

The material facts will appear from the judgment.

N. N. Bose, S. Chatterjee and R. Chaudhury for the Appellant.

G. P. Kar and E. R. Meyar for the Respondents.

* Appeal from Original Order No. 128 of 1950.

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Bukhtiarpur Bihar Light Railway Co. Ltd. v. Union of India

December, 17.

The judgment of the Court was as follows:—

P. B. Chakravartti, C.J.:—This appeal has taken an inordinately long time and that has been because the facts are in such a confused state that the learned Counsel for both parties found considerable difficulty in getting out of them what they required for their respective purposes. It must also be said that the carriage of the proceedings before the learned Judge below was slovenly to a degree on the part of both parties. They did not seem to have considered it necessary to examine what their opponent was saying, nor to apply their minds to deciding what facts they had themselves to prove in order to obtain an order in their favour.

The appellant is a public Limited Company which was formed for the purpose of constructing and maintaining a Railway, operating between the Station of Bukhtiarpur on the East Indian Railway and the town of Behar. There appears to have been an aggreement between the promoters and certain local authorities which entitled those authorities to take over the Railway in certain circumstances. In pursuance of that agreement, the Company appears to have established a Railway running between Bukhtiarpur and Rajgirkund which was a distance of about 30 miles. The line was connected with the East Indian Railway and naturally some mutual adjustments between the appellant Railway and the East Indian Railway became necessary. It is stated in the petition that there was interchange of coaching and goods traffic of every description between the two Railways and the East Indian Railway afforded to the Light Railway joint station facilities as also the right of conveyance over its lines of materials required by the Light Railway for its own purposes.

The case of respondent No. 1 the Union of India who really represent the East Indian Railway, is that as a result of the interchange of coaching and goods traffic between the East Indian Railway and the appellant Railway, a large sum came to be due from the latter by 1950 and on June 6 of that year, a notice of demand was served on the Light Railway, claiming payment of a sum of Rs. 5,22,313-12-6. That amount was made up of the alleged dues of the East Indian Railway under certain

traffic bills and a variety of bills of other descriptions. No payment was made in compliance with the notice but a reply was sent on June 10, 1950, in which it was stated that the company was not liable for the whole of the demand in any event, inasmuch as till a certain date, the management had been in the hands of Martin & Company. Who it was who was making the statement is, by no means, clear since formally at least, it was the Railway itself which was writing and the language used in the letter "prior to our taking over charge from Martins" which suggests that the Railway was taking over charge from itself is plainly meaningless. Be that is it may, it was further stated in the course of the reply that if the District Board of Patna had taken over the Railway, the East Indian Railway should look to the District Board of Patna for payment, inasmuch as the Railway could have taken over only as a going concern, compromising assets as well as liabilities. The only other statement contained in the reply to which it is necessary to refer is that the company was not in a position to accept the entire amount claimed "off hand," inasmuch its Accounts Section would have to check the same and make a report to it as regards its liability for payment.

I should state here that although the company's reply of the June 10, purports to be a reply to the East Indian Railways' letter of the 6th June, the reference to the acquisition of the Railway by the District Board is extraneous to the latter and no mention thereof can be found in it. It was however explained to us by Mr. Bose who appears on behalf of the appellant that the matter of acquisition must have cropped up and must have been discussed between the respresentatives of the Light Railway and the Law Officer of the East Indian Railway to which a reference is to be found in the third paragraph of the Light Railways' reply.

The next thing which happened was that on June 30, 1950, the Chief Commercial Manager of the East Indian Railway addressed another letter to the Light Railway, this time claiming payment of two several sums of Rs. 5,23,203-13-6 and Rs. 61,330-15-3. No reply to this letter is said to have been received.

Thereafter, on July 18, the Union of India made an application to this Court for a winding-up order in respect of the

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Light Railway Company. The petition referred to the dues alleged to have been owing by the Light Railway Company to the East Indian Railway and alleged further that in spite of the two letters of demand sent on June 10 and June 30, 1950, respectively, no payment had been made. The amount of the dues was stated to be Rs. 5,91,784-2-0. It was also stated in the petition that the Light Railway had been taken over from the appellant Company by the District Board, Patna, on or about June 25, 1950, and that according to the information of the petition a sum of Rs. 10,006,230 or there abouts had been paid by the District Board to the Light Railway Company as purchase price or compensation.

On the above allegations the Union of India asked for a winding up order on the ground that the Light Railway Company was unable to pay its debts and on the further ground that the substratum of the Company was gone.

The allegations made by the Union of India in its petition for winding up were sought to be answered on behalf of the appellant company by a so-called affidavit. Why I describe it as "so called," I shall explain later. The affidavit however stated that if the District Board of Patna had really taken over the Light Railway on June 25, 1950, as alleged in the petition, then on the petitioner's own case, it was the District Board which was liable to meet its claims and therefore the petitioner was not a creditor of the Light Railway Company at all. Without prejudice to that basic contention it was further stated that, in no event, could the Light Railway Company be held liable for the petitioner's dues for any period prior to three years and that the amount of the dues and the liability to pay the same were both denied. It was said in the last place that it was not a fact that the District Board of Patna had purchased the Light Railway and that the Railway Company did not admit that possession of the Railway had been taken by the District Board. It was added that there was already as injunction against the District Board not to interfere with the Company's possession.

There was an affidavit in reply, filed on behalf of the Union of India and the only statement contained in that affidavit to which it is necessary to refer is the statement contained in paragraph 8. By that paragraph the Union sought to meet the case put forward by the appellant company that the Railway had not, in fact, been taken over by the District Board, as alleged.

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The declarant of the affidavit who was one S. Khandaseami, describing himself as connected with the Traffic Accounts Department of the East Indian Railway referred to and set out copies a telegram said to have been sent by the Chairman of the District Board of Patna to the General Manager of the East Indian Railway on June 25, 1950, and a letter from the District Board to the General Manager dated June 28, following. It appears from the telegram that according to the sender possession of the Light Railway had been peacefully assumed and regular train services were running. It appears from the letter that according to the writer the purchase price of the Railway had been deposited with the Imperial Bank of India, Patna. Nothing was said in the reply as regards the injunction which, according to the affidavit in opposition, had been issued against the District Board.

These were all the materials before Mr. Justice Bachawat when he made the winding-up order, appealed from. Unfortunately, the learned Judge did not deliver any judgment and so we are deprived of the benefit of knowing what view he took of the facts. All that can be safely presumed is that the learned Judge thought that a case had been made out for his passing a winding-up order.

I have omitted to state that there appears to have been another creditor before the learned Judge viz. the Bengal Nagpur Railway Administration which, through an affidavit affirmed by their Deputy General Manager D. K. Hopkins, put forward a claim of Rs. 1,78,498-14-0. The manner in which this debt was said to have been incurred by the Light Railway Company was the same as in the case of the debt alleged to be due to the East Indian Railway. What part the Bengal Nagpur Railway Administration took in the proceedings before the learned Judge is not at all clear and it appears that in the rectital of the papers read before the learned Judge, as contained in his order, the affidavit of D. K. Hopkings is not included.

The present appeal, I need hardly point out, is by the Bukhtiarpur Bihar Light Railway Company Ltd. On behalf of the Company Mr. Bose took two points before us. He urged, in the first instance, that there had been no valid statutory notice of demand at all and in the second about the alleged dues and therefore the present case was not one where the com-

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pany was unable to pay its debts, nor one where it was just and equitable to pass a winding-up order. Mr. Bose did not seem to set much store by his first point, inasmuch as he himself stated that he took it so that it might not be said against him that he had overlooked or abandoned it. His principal argument was concentrated on the second point.

It appears to us, however, that although the learned Counsel for the appellant did not himself lay much stress on his first point, it is yet a point which must succeed. According to the petition for winding-up itself, the registered office of the Railway Company is situated at No. 135, Canning Street, Calcutta. That being so, if a notice of demand was to operate as a valid statutory notice under section 163(1) (i) of the Indian Companies Act, it would have to be delivered to the Company at its registered office. The letter of June 6, however, was addressed to "Fraser Road, Patna" which was not the appellant Company's registered office. The fact is sufficient to prevent the Union of India from relying upon the notice of June 6, 1950, for the purposes of section 163(1) (i) of the Act. There was indeed a second notice as well which was delivered at the registered office of the appellant company, but that notice was sent only on June 30, 1950, and therefore it could not serve as a statutory notice of demand, seeing that the petition for winding-up was made on July 18. The interval between the service of the notice of demand and the making of the petition for winding up was less than three weeks. I ought to state here that on behalf of the Union of India, Mr. Kar admitted that there was no statutory notice of demand in the case on which his client could rely and he also informed us that the court of appeal had already so held in connection with the application for a stay of the order which is under appeal before us now.

But the fact that the Union of India cannot rely upon any statutory notice of demand merely means that no presumptive or constructive liability to pay the debts, as contemplated by section 163(1) (i) of the Act, is available to the Union. They are at liberty to prove still, in other ways that, in fact, the company was unable to pay its debts within the meaning of Item (5) of section 162. On that question, we listened to an interesting argument from the Bar as to when a company could be held to be unable to pay its debts and as to what the nature of the dispute must be if cases of disputed debts were to be excluded. It seems to me,

however, that in view of one special fact in the case it is unnecessary for us to embark upon an examination of the question debated before us. As I have already said, the demand of the Union of India is for an amount in the neighbourhood of Rs. 6,00,000/-. Even if the demand of the Bengal Nagpur Railway be added, the total would not be more than Rs. 8,00,000/-. Yet, on the admission contained in the petition itself, there is an amount of Rs. 10,00,623/- which belongs to the company and it must therefore be available for the payment of the company's debt. In those circumstances, it is quite impossible for the Union of India to contend that although the appellant company has, according to its own case, a sum of Rs. 10,00,623/- waiting to be paid over to it and although the claims of itself and of the Bengal Nagpur Railway do not exceed Rs. 8,00,000/-, it must yet be held that the company was unable to pay its debts. In my view, even assuming that the company was deliberately avoiding or delaying payment, this was not a case of inability to pay, but a case where the company was failing and neglecting to pay. I am, by no means, holding that between the first demand and the making of the petition there was any deliberate failure or neglect, because in order to arrive at a decision on that point, a much closer examination of the facts would be necessary than is possible on the very meagre materials which are to be found in the paper book. Suffice it to say, for the purposes of the present case, that when the financial position of the company is such that against the admitted assets of the value of Rs. 10,00,000/- there is a debt of Rs. 8,00,000/- only, it can by means be said that the company is unable to pay its debts.

Mr. Kar referred us to a passage in Palmer's Company Law, 19th Edition, Pages 377-78, which reads as follows:

> "Where the debt is undisputed, it is futile for the company to say, "We are able to pay our debts, but we do not choose to pay this particular debt." The court will not listen to such a defence."

Mr. Kar's point was that the mere existence of sufficient funds did not preclude a creditor from contending that in reality the company was unable to pay its debts. If inspite of being possessed of sufficient funds, the company resorted to device or obstruction in order to avoid the claims of creditors, such a case also would be a case of inability to pay the debts. The reason,

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according to Mr. Kar, was that the only solvency which the Company Law recognized was commercial solvency.

The passage in Palmer is shown as based on "Company Precedents" by the same author, Part II, Edition 15th, Pages 36 and 37. Out of the decisions cited in the relevant pages of the 'Precedents,' Mr. Kar drew our attention to the decision of *In re: The World Industrial Bank Limited* (1), which, unfortunately, is to be found reported only in Weekly Notes Report. It appears however from the very brief report that the case was a very peculiar one. The Company there concerned had been incorporated with a capital of £50,000, divided into as many shares of £1 each, out of which only 1,007 shares had been issued. Again, out of the 1,007 shares issued, only a sum of 1s. per share had been called upon 1,000 of the shares. The company had never started any business at all, but had employed the petitioner in some work for which it had incurred to him a liability for a small sum. Even that small sum the company did not pay, so that the petitioner had to go to court and recover judgment for it. After that, the company made it impossible for the petitioner to realise his dues, because it declined to call up any further capital and defined the petitioner to realise his assets from wheresoever he could. It was only in circumstances of such an extraordinary kind that Mr. Justice Neville observed that he could not allow the Companies Acts to be used as instruments of fraud and that in view of the deadlock which the company had created by refusing to make calls and keeping itself deliberately out of the ample means which it could easily command, he thought that it was just and equitable that a winding-up order should be made. It appears to me that the decision cannot be read as laying down any general rule and so far as it was a decision on its own special facts, it need only be pointed out that the facts of the present case are very different. I would, therefore, hold that the Union of India failed not only to establish that there had been a non-compliance with the statutory notice of demand, but also to establish otherwise that the company was unable to pay its debts within the meaning of section 162(V) of the Companies Act.

There remains the other ground upon which also the Union of India relied. The ground is that the substratum of

(1) [1909] W.N. 148.

the company having gone, it was just and equitable that a winding-up order should be made. In the course of the argument I ventured to express some doubt as to whether a creditor could ordinarily be allowed to urge as a ground, in support of his petition for winding up, that the substratum of the company had gone. Having listened to an interesting argument on that question as well, I still entertain that doubt, although I must hasten to add that if a creditor will not ordinarily be heard to urge that a winding-up order should be made, because the substratum of the company is gone, it is not for the reason that he is technically and as a matter of law barred from taking that ground at all, but for the reason that it is not a proper ground for a creditor to urge, except in very special circumstances. Whether the substratum of a company is gone and the object with which it was formed, has become impossible of further pursuit, is usually the proper concern of only its share-holders and contributories: a creditor cannot properly be allowed to use it as a ground for breaking up the company, unless, by the disappearance of the substratum, the recovery of his debt has been imperilled. I need not, however, enlarge further on that point, because it appears to me that the present case can be disposed of on the facts. On the facts it seems to me almost precisely on all fours with the case reported in *Re: Eastern Telegraph Co. Ltd* (1). Indeed, in regard to practically every detail of the facts, the similarity between the two cases is striking. In the English case, company had been incorporated with the object of acquiring the undertakings, telegraph lines, property etc., of four companies, and the establishment of telegraph stations, carrying on the business of a telegraph company. Subsequently, a second company acquired the ordinary share capital of that company and still later a third company bought the whole of its physical assets. Thereafter, came a statute, which provided for compulsory acquisition of the Treasury of the shares of the third company which had purchased the physical assets. After that, proceedings were commenced for the assessment and payment of compensation in respect of the compulsory transfer, but before the termination of those proceedings, an application was made by certain reference stockholders for a compulsory winding-up of the company on the ground, *inter alia*, that the substratum of the company had gone.

(1) (1947) 2 All. E.R. 104.

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Pausing here for a moment, it will be evident that in the present case also, the appellant company had been formed with the object of constructing and maintaining a railway line under the terms of an agreement with certain local authorities and that on the Petitioner's own case, the District Board of Patna acquired the physical assets of the company, namely, the railway itself, presumably under the terms of the agreement. In the present case also there was a certain sum which had been set apart, at the time when the application was heard by the trial court, as compensation payable to the appellant company, but neither the question of the right of acquisition, nor the question of the quantum of the compensation had been finally decided. It would thus seem that the circumstances in which, and the point of time at which, the application for winding-up was made in the present case, were precisely the same as those in *Re: Eastern Telegraph Co. Ltd.* (1).

The judgment of Jenkins, J. in the English case contains an elaborate review of the well-known cases on the propriety or otherwise of making a winding-up order on the ground that the substratum of the company was gone. It is not necessary, as I have already said, to discuss principles for the purposes of the present case. It would be sufficient to say that in so far as the application of the preference stock-holders was based on the ground that the substratum of the company had gone, the learned Judge refused it, on certain considerations of fact as also on a ground of convenience and equity. He pointed out that there had been no failure of the contemplated objects of the company *ab initio*. Similarly, there had been no initial failure of the contemplated objects of the appellant company in the present case. It was pointed out in the next place that there had been no suggestion that the directors should launch upon some adventure not warranted by the Memorandum of Association and not contemplated when the company was formed. Similarly, there is no such suggestion in the present case. It was pointed out next that there had been no confiscation of the property of the company. So has there been no confiscation in the case before us. It was said further that the transfer to the Treasury of the shares of the company which had acquired all the physical assets of the company, sought to be sent to liquidation, was a transaction which the company, proceeded against,

(1) [1947] 2 All. E.R. 104.

was bound to carry out under the Act of 1946. The point in that observation obviously is that if a failure of the objects of the Company had occurred, it had occurred not by reason of any improvidence or wastefulness on the part of the company, but by reason of circumstances over which the company had no control and as a natural offshoot of the terms and conditions under which the company had come into existence. Similarly if, as the Union of India contends, the physical assets of the railway and indeed the railway itself have been taken over by the District Board of Patna, they have been so taken over for no fault of the appellant company, as far as the materials before us show, but because of the existence of the power of acquisition contained in the agreement in pursuance of which the company was formed. It is pointed out, in the next place, in the English case that the transaction of transfer had not been completed at the time when the winding-up order was asked for, because the assessment and payment of the compensation remained to be made. Once again, the similarity is striking, because in the present case, the transaction of acquisition had not been completed at the time when the application for winding up was made, because all that had happened was that the District Board was making an offer of Rs. 10,00,623/- as compensation which had not yet been finally settled or finally accepted by the appellant-company. That being the background of the facts, Jenkins, J. gave it as his reason for refusing a winding-up order that it was eminently desirable that the directors of the company themselves, and not a liquidator, should act on behalf of the company in the matter of settling the compensation. He gave another reason as well, which is not pertinent here. But it appears to me that the reason I have first mentioned is a good reason and sufficient for the disposal of the present case. The reason that the substratum of a company is gone is not one of the specific grounds given in section 162 of the Act for making a winding-up order. The disappearance of the substratum is a circumstance, in view of which the Court may, in a given case, consider it just and equitable that a winding-up order should be made. In the present case, having regard to the fact that the sum of Rs. 10,00,623/- is clearly available for application to the payment of the debts of the company, which do not amount to more than Rs. 8,00,000/-, it appears to me that whether the substratum of

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the company is gone or still subsists is a matter of no concern to the creditor, the Union of India, and there is no reason why we should make a winding up order at the instance of the Union of India on that ground. There is sufficient money belonging to the debtor company against which the Union can prove in the ordinary way for the realisation of their debt. On the other hand, it is plainly preferable that the negotiations for the settlement of a just amount as compensation should be carried on by the directors of the Company who may be expected to be more zealous about the interests of the shareholders than an Official Liquidator who will probably not exert himself beyond a routine performance of his duties. It appears to me in all the facts of the case that whatever the technical right of a creditor may be to obtain a winding-up order in a fact of the case on the ground that the substratum of the company is gone, there is no reason whatever in the present case to induce us to make an order on that ground at the instance of the Union of India. A winding-up order may be a form of equitable execution, but there is no equity in making such an order when the debt of the creditor is not in peril, although the substratum of the company may be gone, and when matters remain outstanding which can be best attended to in the interest of the shareholders by the company functioning as a company through its directors. A winding-up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of debts due from it.

I should add that reference was made before us in the course of the argument to various proceedings, said to have taken place, subsequently. About the effect of those proceedings, we say nothing at all, nor have we taken into consideration anything which does not appear in the paper book. No attempt has also been made to bring before us any other material in a proper form. As I have said, the allegation that an injunction had been issued against the District Board of Patna was not traversed by the Union of India and it would appear from the dates that if the allegation be correct, the District Board took forcible possession of the Railway in the face of an injunction. It would be strange to make a winding-up order on the ground that the substratum of the company was gone, if that state of things was brought about by the high-handed action

of a third party who would perhaps yet have to answer for his act. What the real facts were, have not been made clear by proper materials. Nor is there any material in support of another allegation made before us, that there was a risk of the compensation money being taken out of India. Our sole duty as a Court of Appeal and so a Court of error is to see whether the order of the trial Judge was right at the date it was made and since the grounds upon which it was sought to be supported cannot be sustained on the materials on record, and no other materials have been properly placed before us, we feel bound to set it aside.

For the reasons given above, this appeal is allowed, the order of Mr. Justice Bachawat, dated the 29th August, 1950, is set aside and the application for a winding-up order made by the Union of India on the 18th July, 1950, is dismissed.

One word is necessary about costs. Earlier in the course of this Judgment I referred to the infirmity of the affidavit-in-opposition filed on behalf of the appellant-company. That was an affidavit affirmed by one Syed Mohamed Hashmatullah who described himself as a representative of the appellant company and which he affirmed by saying that "several paragraphs of this affidavit", were "true to his knowledge or knowledge derived from his reading of the records of the case." An affidavit affirmed in that manner is not fit to be looked at. It is next to be observed that there appears practically to have been no contest in the trial Court at all and there is no trace of any of the points urged before us having been raised there. In those circumstances, although the appellant company will have the costs of the appeal, there will be no order for costs, so far as the trial court is concerned.

Certified for two Counsel in the appeal.

S. R. Das Gupta, J.:—I want to add a few words to what my Lord the Chief Justice has said.

In paragraph 8 of the petition it is alleged that the Bukhtiarpur-Bihar Light Railway was taken over from the said company by the District Board, Patna, on or about the 25th June, 1950 and the petitioner had been informed that a sum of Rs. 10,00,623/- or there about had been paid by the District Board to the Company as the purchase price and/or compensation. It is on those allegations that the contention of the respondent, namely that the substratum of the company is gone

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has been founded. Those allegations are not admitted by the appellants and in the affidavit affirmed by Syed Mohamad Hashamatullah, intended to be used in opposition to the respondents application for winding-up, it has been clearly stated that the District Board has not purchased the railway and the company has not accepted a single pice as purchase price and in fact even the amount of the purchase price has not been settled or fixed. Thus it appears to me that the facts on which it is urged by Mr. Kar that the substratum of the Company is gone are very much in dispute between the parties. It is impossible to come to a definite finding one way or the other on the materials before us. It is not possible to come to a definite conclusion that the railway was taken over from the company by the District Board of Patna and unless we can do that the question that the substratum of the company is gone cannot be entertained as the basis for making an order for winding-up. In this connection I should point out that although in their letter, dated the 10th June, 1950, the appellant company made a definite statement that there was already an injunction against the respondent by the High Court and in the affidavit affirmed by Syed Mohamed Hashmatullah the same allegation has been repeated, nothing has been said with regard to the said statement in the affidavit in reply filed on behalf of the Union of India. Only reference has been craved to a certain telegram and a circular letter dated the 28th June, 1950, addressed by the Chairman District Board, Patna, to the General Manager, East Indian Railway. The person who affirmed the said affidavit on behalf of the Union of India has kept completely silent over the question as to whether or not an injunction has been granted by the High Court as alleged on behalf of the appellant. In these circumstances, as I said before, it is impossible to come to a definite conclusion on the facts, on which alone the question as to whether or not the substratum of the company is gone can be decided. I, therefore, hold that this ground taken by Mr. Kar cannot succeed.

On other points I entirely agree with the views expressed by my Lord the Chief Justice.

A. Rashid: Solicitor for the Appellants.

S. K. Mondal: Solicitor for the Respondents.

S.C.P. *Appeal allowed with costs.*

CRIMINAL REVISION.

Before Mr. Justice K. C. Das Gupta, and Mr. Justice D. B. Mookerjee.

SUDHINDRA KUMAR BOSE

v.

THE STATE.*

CRIMINAL 1934. *March, 8.*

West Bengal Criminal Law Amendment (Special Court) Act 1949 (Act XXI of 1949)—Section 12—Effect of Act XII of 1952—Proceedings pending in appeal before the High Court on the date of commencement of Special Court—Amending Ordinance 1952—Whether such proceedings can be transferred to a Special Court.

Where on the date of commencement of West Bengal Criminal Law Amendment (Special Courts) Amending Ordinance 1952, an appeal was pending in the High Court against an order of conviction and sentence passed by a Special Court acting under Section 4(1) of the West Bengal Act XXI of 1949, and subsequently the case was re-allotted to a Special Court:

Held, that the proceedings against the accused were pending in appeal in the High Court, which is a Court other than the Special Court, and as such by virtue of Section 12 of the Act XXI of 1949 (as it stands after amendment by West Bengal Act XII of 1952) nothing in Act XXI of 1949 could apply to the proceedings that were pending against the accused, and that position cannot be escaped by filing a fresh petition of complaint, consequently, the proceedings against the petitioner can never be restarted before a Special Court.

Application by the accused for squashing the proceedings that were started before a Special Court.

The material facts will appear from the judgment.

Ajit Kumar Dutt and Sunil Kumar Bose for the Petitioner.

J. M. Banerjee for the State.

The judgment of the Court was as follows:

K. C. Das Gupta, J.:—On the 2nd of March 1950 a petition of complaint was filed in the court of the Subdivisional

* Criminal Revision No 578 of 1933.

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K. C. Das Gupta, J

Magistrate, Darjeeling against the present petitioner Sudhindra Kumar Bose and one N. R. Ghosh charging them with offences under Section 120B/409 I.P.C. Section 5(2) of Act II of 1947, Section 409 I.P.C., and Section 5(2) of Act II of 1947. Before this case could be tried by the Subdivisional Magistrate it was allotted by an order of the Government of West Bengal dated the 13th of March of 1950 purporting to act under section 4(1) of West Bengal Act XXI of 1949 to the Special Court of the Special Judge at Calcutta constituted under section 3 of that Act. The petitioner was tried by this Court under three charges —a charge under section 120B/409 of the Indian Penal Code, Section 5(2) of Act II of 1947 and two other charges for offences under Section 409 of the Indian Penal Code and under Section 5(2) of Act II of 1947. The said Court convicted the petitioner under Section 5(2) of Act II of 1947 and also under Section 409 of the Indian Penal Code and sentenced him to a period of imprisonment and a fine. An appeal was preferred to this Court and was admitted for hearing by an order dated the 21st of August 1951. This appeal remained pending in this Court from that date until it was disposed of by a Bench of this Court by an order dated the 9th April 1952 which runs as follows:

"The appellant in this case was convicted by a Special Judge to whom the case had been allotted under Section 4(1) of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949. That section has been held to be *ultra vires* by a Special Bench of this Court and therefore the trial was wholly without jurisdiction.

"The appeal must, therefore, be allowed. The conviction and sentence are set aside and the appellant must be regarded as an under-trial prisoner awaiting retrial, if Government so decides. He will continue on the same bail until such retrial."

Thereafter proceedings were again started against the petitioner in the Special Court at Alipore, but as that Special Court was superseded his trial could not be held there. By a notification dated the 22nd December, 1952, the Government of West Bengal thereafter allotted this case to the Special Court of Jalpaiguri-Darjeeling and a petition of complaint was filed in that Court by the Public Prosecutor, Special Police Establish-

ment, West Bengal, Calcutta, on the 27th March 1953. Thereupon the learned Judge presiding over the Special Court ordered issue of summons on the present petitioner and one N. R. Ghosh under section 120B/409 of the Indian Penal Code, section 5(2) of Act II of 1947 and an offence under section 409 of the Indian Penal Code, and an offence under section 5(2) of Act II of 1947 for their appearance on the 13th of May 1953. The petitioner thereafter obtained this Rule in consequence of which there could be no further progress in the proceedings in the Special Court.

It is contended before us on behalf of the petitioner that in view of the provisions of section 12 of Act XXI of 1949 as it stands after amendment by the West Bengal Act XII of 1952, this case is not triable by the Special Court. Section 12 of Act XXI of 1949 after the amendment of that Act by Act XII of 1952 is in these words.

"Nothing in this Act shall apply to any proceedings pending on the date of the commencement of the West Bengal Criminal Law Amendment (Special Courts) Amending Ordinance 1952, in any court other that a Special Court."

It is contended by Mr. Dutta on behalf of the petitioner that on the 9th of April, 1952 which was the date of the commencement of the West Bengal Criminal Law Amendment (Special Courts) Amending Ordinance 1952, the proceedings were pending against the petitioner in the High Court and consequently Act XXI of 1949 could have no application to the proceedings. In my judgment this contention should prevail. As I have already stated the appeal by the petitioner against the conviction by the Special Court for the very offences for which the present proceedings have been started was pending before this Court from the 21st August, 1951, when the appeal was admitted for hearing till it was disposed by an order of the Court of the 9th April, 1952. The fact that sometime on the 5th of April, 1952, the appeal was disposed of by this Court cannot alter the position that for some time on that date which was the date of commencement of the West Bengal Criminal Law Amendment (Special Courts) Amendment Ordinance 1952 the proceedings against the petitioner were pending in appeal

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before this Court. Clearly, this court is a Court other than the Special Court. The consequence must be that nothing in Act XXI of 1949 could apply to the proceedings that were pending against the petitioner. On that date as we have already pointed out, this Court ordered that there should be a retrial of the case. The words "if Government so decides" do not in my judgment, raise any doubt on this question. This court was clearly ordering retrial and the words "if Government so decides" were obviously used to state a thing which need not have been stated that it was open to Government to withdraw the case. That this Court directed retrial is further clear from the words "he will continue on the same bail until such retrial."

The position in law therefore was that the proceedings against the petitioner were pending in appeal before this Court on the 9th of April 1952; the appeal was disposed of on that date and a retrial was ordered. There has not therefore been a termination of those proceedings. If consequently the Special Courts Act does not apply to those proceedings and those proceedings cannot be tried by a Special Court, that position cannot be escaped by filing a fresh petition of complaint. The filing of a fresh petition of complaint will not institute a fresh proceedings distinct from the proceedings that were pending in appeal. So long as these proceedings have not been disposed of in accordance with law, fresh proceedings cannot be instituted against the petitioner.

The result in my opinion is that the Special Court Judge Darjeeling has no jurisdiction to try the case instituted before him on a complaint on the 27th of March 1953. I would accordingly quash the proceedings in his court and order that the proceedings now pending against the petitioner in Court of the Sub-Divisional Magistrate, Darjeeling should now be disposed of in accordance with law.

Debabrata Mookerjee, J.:—I agree.

S.G.P. *Rule made absolute.*

CRIMINAL REVISION.

Before Mr. Justice K. C. Das Gupta and Mr. Justice D. B. Mookerjee.

BAIDYANATH CHANDRA & ORS.

v.

THE STATE.*

CRIMINAL.

1954

April, 8

Special Court Act (Act XII of 1952)—Rice supplied to Government, becomes Government property only on actual delivery to Government—Government made to pay extra money on false representation—Such extra money in the hands of the accused, is Government money, but the offence under Section 420 I.P.C. is complete before the accused become an agent of the Government money.

It is only after the procurement agent delivered the property to Government that the paddy or rice become Government property. Prior to that it was not Government property. Consequently when he was dealing with rice he was not dealing with property belonging to Government as an agent of Government.

If as a result of deception Government was dishonestly induced to pay certain amount of money to the accused, the offence under Section 420 I.P.C. was complete before dealing by the petitioner with Government money was started. The offence under Section 420 I.P.C. cannot therefore be said to have been committed by the petitioner while purporting to act as agent of Government.

Application for Revision by the Accused charged under Section 420 of the Indian Penal Code.

The material facts will appear from the judgment.

Ajit Dutt for the Petitioner.

J. M. Banerjee for the State.

The judgment of the Court was as follows:—

K. C. Das Gupta, J.:—The only question in this Rule is whether the alleged offence under section 420 of the Indian Penal Code said to have been committed by Baidyanath Chandra is triable by a Special Court under the provisions of Act XII of 1952.

*Criminal Revision No. 914 of 1953.

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K. C. Das Gupta, J.

The prosecution case is that Baidyanath who supplied between 3rd and 7th October 1951 a quantity of 1361 bags (2272 maunds) of dhenki rice to the Government procurement godown at Sainthia, submitted bills claiming the procurement price as well as appropriate bonds in respect of stocks so delivered. It is alleged that Baidyanath in fact supplied this quantity of rice from old stocks purchased prior to the date with effect from which bonus was payable, and had not to pay this bonus money to any one. The real allegation on which Baidyanath is said to have committed an offence under section 420 of the Indian Penal Code is that by making a false representation that he had obtained this quantity of rice between the 3rd and 7th October, 1951, Baidyanath induced Government to pay to him certain amounts on account of bonus.

It is contended on behalf of the accused that the offence thus alleged was an offence punishable under section 420 of the Indian Penal Code, committed by a person dealing with property belonging to Government as agent of Government while purporting to act as such agent. If this contention be correct the offence would fall within item 8 of the new schedule of the West Bengal Act XII of 1952 and would consequently be triable under section 4 of the principal Act, by the Special Courts only.

The argument that the offence as alleged has been committed by "a person dealing with property belonging to Government as agent of Government while purporting to act as such" is principally based on the supposition that the accused when procuring rice and delivering rice to Government was dealing with property belonging to Government. In my judgment there is no basis for this supposition. It was only after the procurement agent delivered the property to Government that the paddy or rice became Government property. Prior to that it was not Government property. Consequently when he was dealing with rice he was not dealing with property belonging to Government as an agent of Government.

It was next contended that at least the amount which the Government was induced to pay by way of bonus was Government property and the accused should be considered when deal-

ing with this money to be dealing with property belonging to Government as agent of Government. It should certainly be held, in my opinion, that in accepting from Government the money paid by way of bonus and in keeping it with him or in paying it to any person the petitioner must be held to be dealing with a property belonging to Government as agent of Government. It appears equally clear to me however that the offence under section 420 of the Indian Penal Code if committed by the accused, cannot be said to have been committed by him while purporting to act as agent of Government dealing with Government property. If as a result of deception Government was dishonestly induced to pay certain amount of money to the accused the offence under section 420 of the Indian Penal Code was complete before any dealing by the petitioner with that Government money was started. The offence under section 420 of the Indian Penal Code cannot therefore be said to have been committed by the petitioner while purporting to act as agent of Government.

My conclusion therefore is that on the allegation made against the petitioner, the offence under section 420 of the Indian Penal Code said to have been committed by him is not one committed by a person dealing with property belonging to Government as agent of Government while purporting to act as such agent. It is not therefore triable by a Special Court.

I would therefore discharge the rule.

Debabrata Mookerjee, J.:—I agree.

S.G P. *Rule discharged.*

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee.

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March, 8.

RADHA GOVINDA & ORS.

v.

SUSHILA DASSI & ORS.*

Pre-emption—Bengal Tenancy Act, Section 26F—Co-sharer tenant's right of pre-emption—Necessary parties to pre-emption proceedings—A subsequent purchaser, whether a necessary party—Co-sharer tenant, not a necessary party to pre-emption proceedings.

Though there is nothing expressly stated in Section 26F of the Bengal Tenancy Act or in any relevant statutory provision as to who are necessary parties to an application under that section yet on the general principle that no body should be prejudiced by an order passed behind his back a subsequent transferee should be heard before an order for pre-emption is made and as such he should be made a party in the pre-emption proceedings Moreover, the concluding words of subsection 5 of section 26F of the Bengal Tenancy Act seem to suggest that the subsequent transferee should be made a party to a proceeding under that section.

A co-sharer tenant or a co-sharer in tenancy is certainly entitled to pre-empt in accordance with law, and his right of pre-emption is an independent right which cannot be affected or taken away by any pre-emption proceedings or order to which he is not a party. In the circumstances, it is proper to hold that such a co-sharer tenant is not a necessary party to a pre-emption proceedings at the instance of another co-sharer tenant, although he is certainly a proper party thereto and may be so impleaded and served with notice of the proceedings so as to facilitate his participation therein under subsection 4(a) of Section 26F B.T.A.

Appeal by the Plaintiff.

Suit for Pre-emption.

The material facts will appear from the judgment.

Manindra Krishna Ghosh for the Appellants.

* Appeal from Appellate Decree No. 288 of 1949 against the decree of M. N. Roy, Esq., Subordinate Judge 1st Court of Zillah Midnapore in Title Appeal No. 126 of 1948 dated 14th of February of 1949 affirming the decree of K. N. Roy Chowdhury, Esq., Munsif 2nd Court Midnapore, dated 27th of March; 1948.

Sarat Chandra Jana for the Respondents.

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The judgment of the Court was as follows:—

P. N. Mookerjee, J.:—The appellant was the plaintiff in a suit for declaration of title and recovery of khas possession. The suit was the sequel to a proceeding under Order 21 Rule 100 of the Code of Civil procedure and it arose under the following circumstances:

The plaintiff along with his brother Dharani Sar, since deceased, and their cousin Gopal Chandra Sar held an occupancy raiyati jama of Rs. 12-5-12 gds. in Mouza Mandar, District Midnapore. That jama which contained an area of 8.22 acres was recorded in Interests Nos. 80,60 and 61. Subsequently, however, the jama was partitioned amongst the three co-sharers and on the strength of that partition the plaintiff got his allotted portion of 1.40 acres registered (Kharijed) in the landlords sherista at a separate jama of Rs. 2-10-10 ps. On the 5th April, 1920, the plaintiff sold a portion (1.06 acres) of this separated jama to defendant No. 7, Bibhuti Sar and the predecessor of defendants Nos. 1 to 4, Satish Chandra Sar by name. On the 26th May, 1939, Defendants Nos. 1 to 4, and defendant No. 7 sold a portion (1.02 acres) of their said 1.06 acres of land to defendant No. 5, Kartick Sar and the husband or predecessor-in-interest (Bonbehary Sar, since deceased) of defendant No. 6. No notice of this sale was served upon the plaintiff who was admittedly a "co-sharer in the tenancy" and a "co-sharer tenant" under section 26F of the Bengal Tenancy Act. The plaintiff, however, on coming to know of the sale applied on the 14th September, 1944 for pre-emption under the said section in Miscellaneous Case No. 158 of 1944 and took possession of the said land (1.02 acres) in pursuance of the order of pre-emption made in his favour on the 27th June, 1945. In the meantime, that is, prior to the plaintiffs application for pre-emption, defendants Nos. 5 and 6 had sold, out of their said 1.02 acres, the suit land comprising .47 acres and recorded in C. S. Dag No. 664 of Interest No. 80 to Gopal Sar and, on the 4th June, 1946, this sale was pre-empted by defendants Nos. 1 to 4 in Miscellaneous Judicial Case No. 88 of 1944 which had been started earlier than the plaintiff's pre-emption case. On

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the strength of this pre-emption order in their favour defendants Nos. 1 to 4 dispossessed the plaintiff from the suit land and thereupon the present suit was brought by the plaintiff after an unsuccessful attempt to get back possession under Order 21 Rule 100 of the Code of Civil Procedure.

In the pre-emption proceeding (Miscellaneous Case No. 158 of 1944), started by the plaintiff, Gopal Sar was not made a party and, although, at one stage, defendants Nos. 1 to 4 were therein impleaded, they were not so impleaded as pre-emptors of Gopal Sar's purchase, but in their capacities of former owners and, further, their names were eventually struck out and the plaintiff's pre-emption proceeding was continued and brought to a close in the plaintiff's favour in their absence.

The defendant's pre-emption case also was only against Gopal Sar and the plaintiff was no party thereto.

The Courts below have dismissed the plaintiff's suit on the ground that the pre-emtion order, obtained by him in Miscellaneous Case No. 158 of 1944, did not bind either Gopal Sar or the contesting defendants Nos. 1 to 4 who acquired the said Gopal Sar's interest in the suit land, according to him from the transfer in his favour by the admitted owners defendants Nos. 5 and 6, as the plaintiff's pre-emption order was not obtained against any of those persons (Gopal Sar or defendants Nos. 1 to 4). In the view of the Courts below Gopal Sar was a necessary party to the plaintiff's pre-emption proceeding and, he not having been impleaded therein, the pre-emption order obtained by the plaintiff was ineffective in law against him or against defendants Nos. 1 to 4 who were entitled to claim title to the suit land as Gopal's legal representatives. In the result, the suit was dismissed by the trial Court and also by the lower appellate Court, and hence the present Second Appeal by the plaintiff.

In support of the appeal two points have been urged by Mr. Ghosh. He has first contended that the Courts below were wrong in holding that Gopal Sar was a necessary party in the plaintiff's pre-emption proceeding. In the submission of the appellant's learned Advocate, a subsequent purchaser is not a

necessary party in a proceeding for pre-emption under section 26F of the Bengal Tenancy Act and for this proposition, he has placed particular reliance on an unreported decision of this Court *Kaseraddin Dafadar* v. *Adeladdi Fakir* (1) The appellants second argument rests on the facts that though a co-sharer in the disputed tenancy or a "co-sharer tenant" in respect thereof, he was not impleaded in the defendant's pre-emption proceeding and as such the pre-emption order in the latter's favour did not bind him. In developing this argument, Mr. Ghose went so far as to say that a "co-sharer tenant" or a "co-sharer in the tenancy" was a necessary party to a pre-emption proceeding under section 26F of the Bengal Tenancy Act.

In my opinion, neither of the two arguments advanced by the appellant's learned Advocate, can be accepted and there is no valid ground for disturbing the decision of the two Courts below dismissing the plaintiff's suit. My reasons I shall presently indicate below.

There is nothing expressly stated in Section 26F of the Bengal Tenancy Act or in any relevant statutory provision as to who are necessary parties to an application under that section. That question, therefore, falls to be decided on general principles. One of these principles is that nobody should be prejudiced by an order passed behind his back or made without giving him an opportunity of contesting the same. Under section 26F (4) the pre-emptor gets the right, title and interest accruing to the pre-emptor from the pre-empted transfer. In effect, therefore, the order of pre-emption relates back to the date of the pre-empted transfer which necessarily implies that any subsequent transfer is, under the statute, made subject to the pre-emptor's rights under the said order or, in other words, that the subsequent transferees title to the property is intended by the statute to be affected by such order. On the general principle, stated above, the subsequent transferee should, therefore, be heard before an order for pre-emption is made; in other words he should be made a party in the pre-emption proceeding. This was the view taken by R. C. Mitter, J. in the

(1) Unreported Civil Revision Case No. 1854 of 1946 decided by Henderson, J., on 30th January, 1946.

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case of *Amir Sardar* v. *Munshi Ismail Hossain Sardar* (1). For the reason which I have given above I respectfully agree with the said decision. It is true that, on some occasions, the joinder of the subsequent transferee may give rise to complications and considerably widen the scope of the pre-emption proceeding, but that is certainly preferable to the obvious injustice which may otherwise result to the subsequent transferee from his being deprived of his property without a hearing. The contrary view of Henderson, J. in the case, cited by Mr. Ghosh, sanctions the wresting of one's property behind his back and to such an unjust proposition, I am not prepared to assent in the absence of a clear, either express or arising by necessary implication, statutory provision to that effect. I may add further that the concluding words of subsection (5) of section 26F also seems to suggest that subsequent transferees should be made parties to a proceeding under that section.

Three other decisions remain to be noticed in this connection. In the unreported case of *Biseswar Saha* v. *Rajnath Saha & Ors.* (2), Mukherjee, J., as he then was did not decide this question but actually left open the rights of the subsequent transferee and in the other two, viz. *Girija Nath Kundu* v. *Ahamadali Sardar* (3), and *Shaikh Lokeman Ali* v. *Abdul Motalib* (4), the learned Judges merely held that the subsequent transferee was at least a proper party to the pre-emption proceeding. In my opinion, none of the above case warrants the view that the subsequent transferee is not a necessary party to the pre-emption proceeding.

Clearly also, the pre-emption order obtained by defendants Nos. 1 to 4 suffers from no legal defect. On the date when they applied for pre-emption, the plaintiff could, at best, have claimed to be a "co-sharer tenant" or a "co-sharer in the tenancy," entitled to pre-emption in accordance with law. This right of pre-emption of a "co-sharer tenant" or a "co-sharer in the tenancy" which two "phrases" have been held to be interchangeable and as bearing the same meaning [vide *Amir Sardar*

(1) (1947) 51 C.W.N. 795

(2) Unreported Civil Revision Case No. 2247 of 1945 decided on 15th November, 1945 by Mukherjee, J.

(3) (1945) 50 C.W.N. 806.

(4) (1946) 50 C.W.N. 807.

v. *Munshi Ismail Hossain Sardar* (1), and *Goas Ali Bhuiya & Ors.* v. *Lal Mia & Ors.* (2)], is, however, an independent right of his which cannot be affected or taken away by any pre-emption proceeding or order to which he is not a party (vide in this connection *Dhananjoy Mallick* v. *Annada Charan* (3), *Brindaban Ghose* v. *Jiban Chandra* (4), and it is quite proper to hold—and, indeed, it has been expressly held [*Gobardhan* v. *Gunadhar* (5)] that such "co-sharer tenant" or "co-sharer in the tenancy" is not a necessary party to a pre-emption profeeding at the instance of another, although he is certainly a proper party thereto and may be so impleaded and served with notice of the proceeding so as to facilitate his participation therein under subsection 4(a) of Section 26F.

I, accordingly, hold that the plaintiff was not a necessary party to the pre-emption proceeding of defendants Nos. 1 to 4 and inspite of his non-joinder in the said pre-emption proceeding the order passed in that proceeding vested the said defendants with the right, title and interest of the pre-empted purchaser Gopal Sar and made them his legal representatives so as to entitle them to claim the benefit and, indeed to take the fullest advantage of Gopal's non-joinder in the Plaintiff's pre-emption proceeding.

In the light of the foregoing discussion, I am bound to hold that the pre-emption order, obtained by the plaintiff does not bind the contesting defendants and, indeed, it is of no legal effect so far as they are concerned, and, that being so, the present suit which is essentially an action in ejectment against the said defendants must necessarily fail on the simple ground that the plaintiff has failed to make out any title,—not to speak of a better title,—as against them in respect of the suit property. The appellant's suit was, therefore, rightly dismissed by the two Courts below and their decision must be upheld.

I, accordingly, dismiss this appeal. Having regard however, to the circumstances of this case, I would direct that the parties will bear their own costs in this Court and also in the two Courts below.

S.C.P. *Appeal dismissed.*

(1) (1947) 51 C.W.N. 795 (797). (2) (1947) 52 C.W.N. 90.
(3) (1952), 57 C.W.N. 571. (4) [1953] A.I.R. Calc. 239.
(5) (1949) 44 C.W.N. 802.

SUPREME COURT.

Before Mr. M. P. Shastri, Chief Justice, Mr. Justice M. C. Mahajan, Mr. Justice S. R. Das, Mr. Justice G. Hasan, and Mr. Justice B. Jagannadhadas.

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November, 24.

THE STATE OF WEST BENGAL

v.

SHAIKH SERAJUDDIN BATLEY.*

Indian Independence (Rights, Property and Liabilities) Order 1947—Articles 8 and 9—Contract by undivided Bengal for purposes which continue to be purposes of West Bengal—"Financial obligations" on such contract, whether liabilities of the State of West Bengal.

Where a lease was entered into for purposes which from 15th August, 1947, were exclusively purposes of the Province of West Bengal, rents which accrued previous to that date becomes the liabilities of the Province of West Bengal under Article 8(2) (a) of the Indian Independence (Rights, Property and Liabilities) Order 1947.

The expression "other financial obligations" that occurs in Article 9 of the order, when construed *ejusdem generis*, implies an obligations in the nature of an obligation in respect of loans and guarantees incurred by the Province of Bengal.

Appeal by the Defendant, the State of West Bengal.

Suit for arrears of rent due on a lease of property in Calcutta which continues to be used by the State of West Bengal.

The material facts will appear from the judgment.

S. M. Bose, Advocate-General of West Bengal, N. C. Chatterjee, Senior Advocate, and B. Sen for the Appellant.

R. Chowdhury and B. Chowdhury for the Respondent.

* Supreme Court Civil Appeal No. 119 of 1951 by Special Leave granted by the Supreme Court of India by its Order dated the 14th December 1950 from the Judgment and Decree dated the 9th March 1950 of the High Court at Calcutta (*Harries C.J. and Banerjee J.*) in appeal from Original Decree No. 162 of 1949 arising out of the Judgment and Decree dated the 4th August 1949 of the said High Court (*Sinha J.*) in its Ordinary Original Civil Jurisdiction in Suit No. 1502 of 1948.

C. K. Daphtary, Solicitor-General for India, G. N. Joshi and P. A. Mehta for the Intervener the Union of India.

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The Judgment of the Court was delivered by

S. R. Das, J.:—This is an appeal by special leave by the State of West Bengal from the judgment and decree passed on the 9th March, 1950 by a Division Bench of the Calcutta High Court affirming the judgment and decree pronounced by Sinha, J., on the 4th August 1949 in exercise of the ordinary Original Civil Jurisdiction of that Court. The question for consideration in this appeal is whether on a proper interpretation of Articles 8 and 9 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, the appellant can be held liable for payment of rent and taxes for a period prior to the 15th August 1947 in respect of a premises which had been taken on lease by the undivided Province of Bengal.

The relevant facts are shortly these. By an indenture of lease dated the 22nd February 1947 the respondent demised to the Governor of the undivided Province of Bengal the first, second and third floors of premises No. 73, Dharmtolla Street in the town of Calcutta for a term of three years commencing from the 1st day of February 1947 yielding and paying unto the lessor therefor during the said term a monthly rent of Rs. 1,800/- only clear of all deductions by equal monthly payment on the 5th day of each and every month for the month immediately preceding and also the sum of Rs. 150/- per quarter towards payment of occupier's share of municipal taxes. By the lease the lessee covenanted that he would, during the said term, use the demised premises only for a hostel for the students of the Campbell Medical School and shall not at any time during the said term use the demised premises or any part thereof for any other purpose whatsoever. The lessee further agreed to pay the costs of and incidental to the lease. On the 15th August 1947 the partition of India took place and, amongst other things, two new provinces came into existence, namely, West Bengal and East Bengal in place of the old Province of Bengal. The Province of West Bengal formed part of the Dominion of India and is now the State of West Bengal in the Union of India while

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the Province of East Bengal became and is still a part of the dominion of Pakistan. The Indian Independence Act, 1947, by section 9 empowered the Governor-General, amongst other things, to make such provision as appeared to him to be necessary or expedient for dividing between the new provinces to be constituted under that Act the powers, rights, properties, duties and liabilities of the provinces which under that Act were to cease to exist. In exercise of that power the Governor-General promulgated an Order called the Indian Independence (Rights, Property and Liabilities) Order, 1947, hereinafter referred to as the said Order, to deal with the powers, rights, property, duties and liabilities of the respective Government of West Bengal and East Bengal. Article 8(2) of that Order, which is material for the purposes of this appeal, was in the following terms:—

> "Any contracts made on behalf of the Province of Bengal before the appointed day shall, as from that day—
>
> (a) if the contract is for purposes which as from that day are exclusively purposes of the Province of West Bengal, be deemed to have been made on behalf of that Province instead of the Province of Bengal; and
>
> (b) if any other case be deemed to have been made on behalf of the Province of East Bengal instead of the Province of Bengal;
>
> and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Province of Bengal, be rights or liabilities of the Province of West Bengal or the Province of East Bengal, as the case may be."

Clause (6) of Article 8 provided that the provisions of that Article would have effect subject to the provisions of Article 9 of that Order. The relevant portion of Article 9 was as follows:—

> "9. All liabilities in respect of such loans, guarantee and other financial obligations of the Governor-General in Council or of a Province as are outstanding immediately before the appointed day shall as from that day—

(a) .....

(b) in the case of liabilities of the Province of Bengal, be liabilities of the Province of East Bengal."

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On the 8th May, 1948 the respondent filed a suit in the Calcutta High Court against the appellant claiming Rs. 21,600 as arrears of rent at Rs. 1,800/- per month from February 1947 to January 1948, Rs. 600/- as occupier's share of municipal tax for the same period and Rs. 523/9/3 being the costs of and incidental to the lease, aggregating to Rs. 22,723/9/3. During the pendency of this suit the appellant paid Rs. 9,250/- being the arrears of rent and taxes from the 15th August 1947 but denied liability for the arrears of rent or taxes for any period prior to that date or for the costs of the lease.

The case was heard by Sinha, J., who by his judgment dated the 10th August 1947 held, amongst other things, that the lease was entered into for purposes which as from the 15th August 1947 were exclusively purposes of the Province of West Bengal and that under Article 8(2) (a) of the said Order the appellant was clearly liable for the rents which had accrued previous to the appointed day, that is to say, the 15th August 1947, and decreed the suit for Rs. 13,473/9/3 with costs and interest on judgment at 6 per cent. The Province of West Bengal preferred an appeal from that judgment but a Division Bench of the said High Court (Harries, C.J. and Banerjee, J.) affirmed the decree and dismissed the appeal with costs. The State of West Bengal which took the place of the Province of West Bengal applied for leave to appeal but that application was dismissed. The State of West Bengal thereafter applied for and obtained special leave to appeal from this Court and the appeal has now come up before us for final disposal.

The learned Advocate-General of West Bengal appearing in support of this appeal fairly and frankly conceded that in the absence of anything else this case would be wholly covered by Article 8(2) (a) but contended that by virtue of Article 8(6) that Article was to have effect subject to the provisions of Article 9. In the circumstances the question whether the contract was for purposes which as from the appointed day were exclusively pur-

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poses of the Province of West Bengal and whether Article 8(2) made any distinction between liabilities which had accrued or which might accrue need not be considered.

The argument before us has been confined only to the interpretation of Article 9. Learned Advocate-General contends that the liability to pay rent under the lease comes within the expression "other financial obligations" to be found in that Article. According to him all obligations to pay money under a contract whether by reason of covenant to pay money or by way of damages for breach of contract may be properly described as "financial obligations." It is no doubt true an obligation to pay money under a contract or for breach thereof is in a sense a "financial obligation" but the question is not what may popularly be described as "financial obligation" but what is the meaning of the expression "other financial obligations" in the context in which it has been used. To accept the argument of the learned Advocate-General will be to rob Article 8 of practically the whole of its content excepting claims for injunction or specific performance of the contract or the like. Such, we apprehend, could not have been the intention of the framers of that Article. This difficulty does not arise if the expression be construed *ejusdem generis*, for so construed it implies an obligation in the nature of an obligation in respect of loans and guarantees incurred or undertaken by the State as held by Harries, C.J., in *Province of West Bengal* v. *Midnapur Zemindary Co. Ltd.* (1), which has been followed by Chunder, J., in *Sree Sree Iswar Madan Gopal Jiu* v. *Province of West Bengal* (2) and by Kapur, J., in *The State of Punjab* v. *L. Mohan Lal Bhayana* (3). The phrase "loans, guarantees and other financial obligations" occurred in section 178 in Part VII of the Government of India Act, 1935 and there cannot be any doubt that those expressions used in that section did not refer to all and sundry pecuniary obligations of the State arising out of contracts of every description. The loans and guarantees there referred to meant, it would seem, the special kinds of contracts relating to State loans and State guarantees. In that context

(1) (1949) 54 C.W.N. 677; 85 C.L.J 202; [1950] A.I.R. Cal. 159.

(2) (1950) 54 C.W.N. 807.

(3) [1951] A.I.R. Punjab 382.

"financial obligations" would mean obligations arising out of arrangement or agreements relating to State finance such as distribution of revenue, the obligation to grant financial assistance by the Union to any State or the obligation of a State to make contributions and the like. It is, however, not necessary or desirable to attempt an exhaustive definition of the expression "financial obligations." The Court will have to consider in each case whether a particular obligation which may be the subject-matter of discussion falls within the expression "financial obligations" within the meaning of Article 9. What ever liabilities may or may not come within that expression we are clearly of opinion, in agreement with the High Court, that the liability to pay rent under a lease certainly does not come within that expression.

The result, therefore, is that we affirm the decision of the High Court and dismiss this appeal with costs.

P. K. Bose: Agent for the Appellant.

A. N. Mitter: Agent for the Respondent.

G. H. Rajadhyaksha: Agent for the Intervener.

S.G.P. *Appeal dismissed with costs.*

ORIGINAL CIVIL.

Before Mr. Justice D. N. Sinha.

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August, 24.

GOPAL CHANDRA MUKHERJEE
v.
B. C. DAS GUPTA & ORS.*

Constitution—Article 226 of the Constitution—Fundamental rights, reasonable restrictions on—West Bengal Clinical Establishment Act 1950—Whether the restrictions imposed by the Act are in breach of the fundamental rights,

Rule-making powers—Rule making power, a delegation of authority by the Legislature to the executive—Limits to the delegation of legislative power.

Article 19 of the Constitution confers on the citizen certain fundamental rights, but these rights cannot be conceived to be unfettered and absolute. These rights are always subject to reasonable restrictions for the benefit of the society as a whole. Restrictions imposed by the West Bengal Clinical Establishment Act 1950 must be held to be for the general welfare of the society and as such reasonable.

Tara Charan Mukherjee v. *B. C. Das Gupta & ors* (1). approved.

The problem, that of the extent to which power which is legislative in nature may be delegated by a legislative body to the executive, is, indeed, one which is common to all democratic states. On the one hand, it is undeniable under present day conditions because without it, the Legislature would be unable to pass that kind and quantity of legislation which modern circumstances require. At the same time, there exists great danger in excessive delegation to the executive.

But if the Act has clearly laid down the policy and the Legislature has not parted with its control or authority, it cannot be held that the Legislature has abdicated its constitutional powers. The Legislature delegates such powers as are necessary to be delegated regard being had to the intent and purpose of the enactment and such exercise of discretion is well within the constitutional limits.

In re: The Delhi Laws Act (2), discussed.

Application under Article 226 of the Constitution (mandamus) challenging the validity of the provisions of the West Bengal Clinical Establishment Act, 1950 and the Rules made

* Application in *re:* Original Side Suit No. 153 of 1952.

(1) (1953) 92 C.L.J. 17. (2) [1951] S.C.R. 747.

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thereunder and certain orders of the Government issued in pursuance thereof.

The material facts will appear from the judgment.

M. N. Banerjee for the Petitioner.

A. K. Sen, Jr. Standing Counsel for the Respondents.

The judgment of the Court was as follows:—

D. N. Sinha, J.:—This is a Rule issued upon the respondent to show cause why a writ in the nature of *Mandamus* should not issue directing the said respondents to rescind, cancel or to recall the notification dated 9th of August 1952, published in the Extraordinary issue of the Calcutta Gazette dated 11th day of August 1953, and the Notice No. 10171 dated the 30th day of October 1952 or to forbear from acting thereon or giving effect thereto in any manner.

Notification Nos. P. H. 2209/2A/52, P. H. 2210/2A—9/52 and P.H. 2211/2A-9/52, all dated 9th August 1952, relate to the West Bengal Clinical Establishment Act 1950 (LVI of 1950) hereinafter referred to as the ('Act') and the rules made thereunder hereinafter referred to as the ('rules'). The notice dated the 30th October, 1952, purports to reject the application of the petitioner for the registration and issue of a license under the Act and directs him to close his establishment. I have already dealt with the constitutional validity of this Act in *Tara Charan Mukherjee* v. *B. C. Das Gupta & ors.* (1). I have held that the Act is *intra vires* of the State Legislature. Mr. Banerjee appearing on behalf of the petitioner in this case has re-argued the whole matter with great ability and has formulated certain point which had not been raised in the previous case.

The facts in this case are briefly as follows:

The petitioner is the owner of a 'physical therapy' establishment situated at No. 3, British Indian Street, Calcutta run under the name and style of the "Avenue Health Clinic." Previous to the 23rd November 1950, such establishments did

(1) (1953) 92 C.L.J. 17.

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not require a licence. On that date, however, the above mentioned Act passed by the West Bengal Legislature for regulating all clinical establishments within the State of West Bengal came into operation. Under that Act, "a clinical establishment" means a nursing home, a physical therapy establishment, a clinical laboratory or an establishment analogous to any of them by whatever name called. A "physical therapy establishment" means an establishment where persons are usually treated by physical means such as massage, electro-therapy, hydro-therapy, remedial gymnastics or the like. It might be well to mention here that the words "physical therapy" or "physio-therapy" are a comparatively modern innovation. It relates to the science of scientific massage and medical-gymnastic exercises. In a primitive form, they are very old, probably as old as civilisation itself. The word "massage" is itself derived from an arabic source. It is mentioned in ancient Sanskrit texts. The ancient Egyptians, the Chinese and the Persians all practised it in some form or other It was well-known to the Greeks and the Romans. Within the last fifty years however scientific-massage and medical-gymnastics have become a branch of physical medicine or physio-therapy, and they are used with very great effect in the treatment of diseases of the nerves and muscles, in physical injuries of all description and in curing physical deformity. Today it is a branch of medical science which requires special technical training and specialised equipment. It is not that the ordinary forms of physical massage have disappeared, but in its scientifically developed form it can no longer be entrusted to amateurs or persons without a proper scientific training and without specialised equipment. Judging by the fact that the physio-therapist has to perform such ambitious tasks as re-educating paralysed limbs or treating deformities or curing serious diseases of the heart, it is quite apparent that it would be dangerous to entrust such treatment to persons who have not obtained the requisite training for the purpose. In the Western countries, there exist incorporated bodies, exercising organisational control, who make arrangements for imparting training, viz., the "Chartered Society physio-therapy" in England and the American" Association of physio-therapy" in the United States of America. Similar institution exist in Norway, Denmark, Holland, Sweden and Australia. So far as I can see, the Act was passed in order to effect some control

over such institutions which have come into existence in or about Calcutta with great rapidity during the last few years. The preamble of the Act states that it was expedient to introduce a system of registration and licensing in respect of clinical establishments under section 9 of the Act, powers are given to the State Governments to make rules for the purpose of carrying out the provisions of the Act. Such Rules have been framed. I shall have to deal with the relevant portions of the Act and the Rules, in detail hereafter.

On or about the 1st of July 1952 the petitioner applied for registration and issue of a licence in respect of his physical therapy establishment, and deposited Rs. 200/- as required. At that time, no rules had been framed, but such rules came into operation on or after the 11th of August 1952 when they were published. Under the rules, a physical-therapy establishment has to conform to a certain standard and can employ only qualified personnel. Dr. Haridas Mukherjee, Inspecting officer appointed under the Act, inspected the petitioner's clinic on or about the 13thi August, 1952, and submitted his report on the same day. According to the report, the petitioner's physical therapy establishment had no proper qualified personnel; the premises were not suitable for the purpose; the clinic had no equipment and did not possess the necessary books and registers. The report shows that besides the proprietor who is himself not scientifically trained, the clinic had one Dr. Anupam Ghosh, L.M.F. who attended two hours daily. There were no male masseure and the institution claimed to have five female masseurses, none of whom had the requisite training or held any physiotherapy qualifications. One of them appears to have been trained by a doctor for one month and another for five months. The clinic, according to the report had small dirty cabins, ill ventilated and not suitable at all for being used as adjuncts to a curative establishment. So far as equipment and medicines are concerned, they were totally absent. The entire establishment had one bath room and one tap with irregular supply. The establishment had no account register; no register of patients and as appears from the report, no recocrds of any description excepting a register of employees. I might further mention that along with the application for registration, the petitioner submitted a list of employees together with their

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qualifications. The list, a copy whereof is annexed to the affidavit of A. Sen affirmed on 19th January, 1953, consists of one male masseur, six lady masseuses and one doctor. Comparing this list with the actual list of employees that were found on the premises upon inspection, I find that excepting two lady masseuses and one doctor, the list does not tally. I do not find any explanation in the affidavits for this discrepancy.

Pursuant to the report, the licensing authority refused the licence on the 24th October, 1952, and this refusal was communicated to the petitioner by letter dated 30th October, 1952. This letter was signed by A. Sen who is the "licensing authority" appointed under the Act, but he is described mistakenly as the "licence issuing authority." On the 25th November, 1952, this mistake was corrected. On the 22nd November, 1952, the petitioner appealed against the order of rejection but he was not successful. This rule was issued on or about 13th December, 1952.

Mr. Banerjee on behalf of the petitioner has taken the following points:—

1. The Act is *ultra vires* because there has been a total delegation of legislative power.

2. The rules made under the Act are *ultra vires*, and not within the four corners of the Act.

3. Certain notifications whereby rules have been promulgated and/or amended and/or regulations added to the rules, are not within the four corners of the Act or the rules and are otherwise invalid.

4. The Act, read together with the rules as amended and added to by the notifications, is unworkable.

5. The petitioner's clinic is entitled to exemption under section 8(d) of the Act.

6. In coming to the conclusion that the petitioner's establishment is:

(i) Housed in an inadequate premises;
(ii) Lacking in adequate equipment;
(iii) Lacking in qualified personnel;

the authorities are in error inasmuch as no standards have been prescribed either in the Act or rules about the location, equipment or personnel of such an institution. So far as any attempt has been made to prescribe qualifications for personnel, it is vague in any event, not attainable in India.

7. The pretended examination held in the Writers Buildings is unauthorised and in any event, has no rational connection with the prescribed qualifications.

8. The prescribed qualifications are vague and meaningles inasmuch as "approved institutions" have not been properly specified. There are no approved institutions or properly qualified persons in India.

9. The Act and the rules infringe the fundamental rights of the petitioner conferred by article 19(1) (9) of the Constitution.

10. The order of refusal was made by the "licence issuing authority." There is no such office in existence: Hence the order of refusal was incompetent.

11. There has not been a compliance with section 4, sub-section 3(d) inasmuch as no grounds are given for rejection in the order of refusal.

12. The Act and the rules are unconstitutional inasmuch as they infringe Article 14 of the Constitution.

On the first point I have heard Mr. Banerjee at length He has taken me through the Act, rules and notifications. His main contention is that there had been a complete delegation of legislative power by the State Legislature in favour of the State Government. He contends that the Act itself is wholly inadequate and is a mere excuse for delegating the entire power

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of legislation to the Executive Government who under the guise of its rule-making power is continuing to promulgate the law. Mr. Banerjee complains that the preamble of the Act itself shows that the Legislature was merely concerned with introducing a system of registration and licensing but the entire law-making in respect thereof has been left to the State Government. He points out that "prescribed" under section 2(f) of the Act, means prescribed by rules made under the Act and that the entire law has been prescribed by rules and notifications, and very little is to be found in the Act itself. To illustrate this Mr. Banerjee refers to the following provisions of the Act: Paragraph 3 provides that an establishment has to be carried on according to the terms of a licence. Under section 4(1), the application for such a license is to contain such particulars and be accompanied by such fee as may be "prescribed." Under section 4(2), the authority to be satisfied that the establishment fulfils such conditions is the "prescribed" authority. Under section 4(3), it is the "prescribed" authority which has the power of granting or rejecting an application. Under section 4(5) the license granted would be on such terms as might be "prescribed." Under section 5, it is the "prescribed" authority who can cancel an existing licence. Under the powers given under section 6 the State Government may authorise any officer to do certain things subject to such regulations as may be "prescribed." Mr. Banerjee points out that it is quite obvious that the entire administration of the Act is to be regulated by such rules and regulations as may be "prescribed" by the State Government. Finally he points out to the rule-making section, namely section 9 which states that the State Government might make rule for the purpose of carrying out the provisions of this Act. Mr. Banerjee points out that the provisions are no more than conferring upon the State Government power to frame the whole Act under the guise of making rules. In short, Mr. Banerjee's complaint is that the Act provides nothing excepting to the State Government the authority to make up for the omissions of the Legislature. This, he points out is a total abrogation of its legislative powers.

Mr. Banerjee attacks the Act and rules by saying that even if there be not a total abrogation by the Legislature of its legislative function, there is certainly a parallel executive legislation.

Further he says that there has been a re-delegation of delegated powers which is not permissible.

The problem, that of the extent to which power which is legislative in nature may be delegated by a legislative body to the executive, is, indeed, one which is common to all democratic States. On the one hand, it is undeniable that some delegation of legislative authority is unavoidable under present-day conditions, because without it, the Legislature would be unable to pass that kind and quantity of legislation which modern circumstances require. At the same time, however, there exist great danger from the constitutional point of view, in excessive delegations to the Executive. As has been expressed by Mukherjea, J. [*in re: The Delhi Laws Act* (1)], the Legislature "can on no account throw the responsibility which the constitution imposes on it on the shoulders of an agent or delegate and thereby practically abdicate its own powers."

Before investigating into the case law on the point, it will be well to remember that in so far as the delegation of legislative power is concerned, there is a substantial difference between the British Constitution and those in India and the United States. The doctrine of parliamentary supremacy is the dominant characteristic of British political institutions. Under it, according to the well-known aphorism, "Parliament can do everything but cannot make a woman a man and a man a woman." Therefore, in England there can be no question with regard to the validity of statutes delegating legislative power because there is no constitutional limitations restraining Parliament from delegating its power in any way it likes. In this respect, however, the constitutional position is different both in India and the United States. In fact, as Mahajan, J. points out in *In re: The Delhi Laws Act* (1) at page 889. "The constitutional position in India approximates more closely to the American model than to the English model." This however does not mean that it is perfectly safe to follow the American authorities. It is well to remember a peculiarity of the American Constitution in this respect wherein it differs from the Indian Constitution. The doctrine of the separation of powers is implicit in the American constitution. This doctrine may be stated as follows:—

(1) [1951] S.C.R. 747 (974).

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"The all the powers intrusted to Government, whether State or national are divided into the three grand departments—the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants; and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined." [*Kilbourn* v. *Thompson* (1)].

The rule against delegation in America is based on the maxim "delegate potest non potest delegari." The legislative process, the judicial process and the executive process all imply the idea of delegation from some ultimate source of power. In American democratic theory, as in American constitution law, that source of power is professedly the people of the United States. [*Landis, The Administrative Process,* 48 (1938)]. But since the three branches of government are, under this theory, the recipients of the legislative, judicial and executive power delegated by the people, it follows, from the maxim against delegation that they must be the sole repositories of such power.

In practice, however, it has not been found possible to keep these powers entirely separate. As Mr. Justice Cardozo put it, "the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor" *Panama Refining Co.* v. *Ryan* (2).

The result is that, in America the promulgation of general regulation by the executive acting under statutory authority is a normal feature of the Federal administration. It has been realised that the maxim against delegation was a political maxim and not a technical rule of law. Functions have been allowed to courts as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated facts so that the Congress might move with freedom in modern fields of legislation with their great complexity and shifting facts, calling for technical knowledge and skill in administration, having realised

(1) (1880) 103 U.S. 168 (190). (2) (1934) 293 U.S. 388 (440)

that the enforcement of a rigid conception of separation of powers would make modern government impossible.

The nett result has been that the American courts have applied the test, not whether there has been any delegation of legislative power, but as to whether the legislative grant of power was in fact inordinate. A delegation is permissible but not in so wide a form that it cannot be canalised and is unconfined and vagrant or where it was impossible to discern its limits. *Panama Refining Co.* v. *Ryan* (1); *Schechter Poultry Corp.* v. *U.S.* (2).

It has however been held that this doctrine of separation of powers, as it prevails in America, is a doctrine inapplicable to India. (Per Mukherjea J. in *In re: The Delhi Laws Act* (3). It is necessary to bear these distinction in mind, while discussing English and American authorities and in applying them to the facts of this case.

I shall first of all refer to the Supreme Court decision, *In re: The Delhi Laws Act* (3). This was a reference made by the President of India under Article 143 of the Constitution, asking the opinion of the Supreme Court on the three questions submitted for its consideration and report. Three Acts were selected for reference to the Supreme Court in its advisory jurisdiction. These are: The Delhi Laws Act, 1912, The Ajmer-Merwara (Extension of Laws) Act, 1947, and the Part C. States (Laws) Act, 1950. All these are Central Acts. The powers that were delegated by these Acts to the Central Government might be summarised as follows:—

(i) Power to extend Central Acts to specified territories.

(ii) Power to extend Provincial or State Acts, that is to say, Acts not passed by the delegating authority itself to such territories.

(1) (1934) 293 U.S. 388.

(2) (1934) 295 U.S. 495.

(3) [1951] S.C.R. 747 (965).

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(iii) Power to make restrictions and modifications in the Acts extended.

(iv) Power to repeal or amend any corresponding law except Central Acts in force in such territories at the time of extension.

The questions were directed as to the validity of these Acts.

The reference was heard by a full Court of seven Judges, who, however, could not be unanimous on any of the questions raised. The broadest view was taken by Fazl Ali, Patanjali Sastri (as he then was) and Das, JJ., who held the delegation of all the abovementioned powers to be valid, and the narrowest by Mahajan, J., who thought none of these delegations to be so. The Court by a majority declared the delegation of the three first-mentioned powers to be valid and that of the fourth to be invalid. Bose J., thought himself bound by previous decisions and made it clear that had he been left free, he would have held the delegation of all these powers to be invalid.

For the purposes of this application it is not necessary to consider in detail the findings of all the learned judges in the Supreme Court, but I shall try to summarise such findings as far as they are relevant for the purposes of this application.

Per Kania, C.J.:

(1) The power to delegate legislative functions generally is not warranted under the Constitution of India at any stage.

(2) The whole scheme of the Constitution is based on the concept that the legislative functions of the Union will be discharged by the Parliament and no other body. The essential of legislative functions, viz. the determination of the legislative policy and its formulation as a rule of conduct are in Parliament, or the State Legislature, as the case may be and nowhere else.

(3) In exercising the power of delegation a legislative body cannot abdicate or efface itself. The true test is—

(i) whether in conferring the power the legislature retains its control;

(ii) does the act of the delegate derive sanction from itself or what the legislature has indicated.

(4) A legislature as a part of its legislative functions can confer powers upon an executive authority or administrative body to make rules and regulations for carrying an enactment into operation and effect. It can further provide that the executive authority or administrative body, upon certain data or facts being found and ascertained, might bring into operation the enactment or extend the same to certain areas. This is described as "conditional legislation."

(5) If owing to unusual circumstances and exigencies the legislature does not choose to lay down detailed rules or regulations that work may be left to another body which is then deemed to have subordinate legislative powers. This is described as "subordinate legislation." *Hodge* v. *Queen* (1); *In re: The Initiative and Referendum Act* (2).

Per Fazl Ali, J.:—

(1) The legislature must normally discharge its primary legislative function itself and not through others.

(2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilise any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to, and necessary for, the full and effective exercise of its power of legislation.

(3) It cannot however abdicate its legislative functions, and therefore, while entrusting power to an outside agency it

(1) (1883) 9 A.C. 117.
(2) [1919] A.C. 933 at 945.

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must see that such agency acts as a subordinate authority and does not become a parallel legislature.

(4) The doctrine of separation of power and the judicial interpretation it has received in America ever since the American Constitution was framed, enables the American Courts to check undue and excessive delegation, but the Courts of this Country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, this being its good sense and the principle that it should not cross the line beyond which delegation amounts to "abdication and self-effacement."

Per Mahajan, J.:—

(1) Delegated legislation is only a special aspect of the problem of administrative discretion. The necessity of delegating the rule-making power on a large scale to administrative authorities is such a basic fact of modern industrial society as the assumption by the State of certain obligation of social welfare.

(2) The problem however is, how delegated legislation and administrative discretion are confined and controlled so as to comply with the elementary principles of law in a democratic society. The answer to the problem has to be found within the ambit of the Constitution of the country concerned and on the construction that a lawyer or a jurist will place on it with a constructive and not a purely legalistic approach.

(3) Judicial opinion on this subject is in a fluid state and impossible to reconcile on the basis of any rigid principles of constitutional law. In England the parliament is for the time being following the recommendations of the Donoughmore Committee. In America the doctrine against delegation of legislative powers still holds the field. In Canada as well as in India the rule laid down by Their Lordships in the Privy Council in *"Burah's case"* (1). has never been departed from in theory. The same view was maintained in the earlier Australian decisions. Recently Australian decisions have gone

(1) (1878) L.R. 5 I.A. 178.

to the length of holding that even essential legislative power can be delegated so long as the principle does not completely efface itself.

Per Mukherjea, J.:—

(1) In considering whether a delegation of power is valid, in India, the doctrine of separation of powers prevailing in America cannot be of any assistance. Too much importance cannot also be attached to the maxim "Delegatus non potest delegari," although as an epigrammatic saying it embodies a general principle that is not irrelevant.

(2) The work of law-making should be done primarily by the authority to which that duty is entrusted although such authority could employ an outside agency or machinery for the purpose of enabling it to discharge its duties properly and effectively; but it can on no account throw the responsibility which the Constitution imposes upon it on the shoulders of the agent or delegate and thereby practically abdicate its own powers.

(3) Broadly speaking, the question of delegated legislation has come up for consideration before Courts of law in two distinct classes of cases. One of these classes comprises of what is known as cases of "conditional legislation." The other class is what is known as "subordinate legislation."

(4) In conditional legislation, the law is full and complete when it leaves the legislative chamber but the operation of the law is made dependent upon the fulfilment of a condition and what is delegated to an outside body is the authority to determine, by the exercise of its own judgment, whether or not the condition has been fulfilled. Conditional legislation is not delegated legislation at all; *King Emperor* v. *Benoarilal* (1).

(5) Subordinate legislation comprises cases of delegation proper, where admittedly some portion of the legislative power has been conferred by the legislative body upon what is described as a subordinate agent or authority.

(1) (1944) L.R. 72 I.A. 57.

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(6) The limits of subordinate legislation, where admittedly a portion of the law-making of the legislature is conferred or bestowed upon a subordinate authority, and the rules and regulations which are to be framed by the latter, constitute an integral portion of the statute itself, are as follow:—

(i) Subordinate legislation must operate under the control of the legislature from which it derives its authority and on the continuing operation of which its capacity to function rests.

(ii) A subordinate legislation cannot have the independent and unqualified authority which is in absolute or true legislative power [*Victorian Stevedoring and General Contracting Company Proprietary Ltd.* v. *Dignan* (1)].

(iii) If the legislature hands over its essential legislative power to an outside authority, that would amount to a virtual abdication of its power and such an act would be in excess of the limits of permissible delegation.

(iv) The essential legislative function consists in the determination or choosing of the legislative policy and of formula enacting that policy into a binding rule of conduct. It is open to the legislature to formulate the policy as broadly and with as little or as much detail as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the detail within the framework of that policy. So long as a policy is laid down and a standard established by statute, no constitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the legislation is to apply: *Schechter Poultry Corpn.* v. *U.S.* (2).

(v) It is enough if the legislature lays down an intelligent principle which can be implemented by the subordinate authorities for specific cases or classes of cases: *J. W. Hampton* v. *U.S.* (3).

(1) (1931) 46 C.L.R. 73, 108 (2) (1931) 295 U.S. 495
(3) (1927) 276 U.S. 394.

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(vi) The policy may be particularised in as few or as many words as the legislature thinks proper and it is enough if an intelligent guidance is given to the subordinate authority. The Court can interfere if no policy is discernible at all or the delegation is of such indefinite character as to amount to abdication; but as a discretion vests with the legislature in determining whether there is necessity for delegation or not, the exercise of such discretion is not to be disturbed by the Court except in clear cases of abuse.

Per Das, J.:—

(1) The power of delegation is a necessary incident to the exercise of legislative power and the practical reasons for such delegation have been stated to be:

(a) Parliament's lack of time to shape all legislative details;

(b) Lack of technical knowledge and aptitude of a miscellaneous assembly such as a Parliament;

(c) The occurrence of conditions which require immediate attention at a time when Parliament is not in session or is otherwise incapable of giving immediate attention;

(d) A desire to preserve essential elasticity of laws affecting people's lives so closely.

(2) In America, the land of separation of powers, all that now remains of the doctrine is simply that the legislature must itself lay down the policy or fix a primary standard.

(3) There is and will always remain some risk of abuse whenever wide legislative powers are committed in general terms on a subordinate body. But the remedy lies in the corrective power of the legislature itself, and, on ultimate analysis, in the vigilence of public opinion and not in arbitrary judicial fiat against the free exercise of law-making power by the legislature within the ambit fixed by the instrument of its Constitution.

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It is not for the Court to substitute its own notions of experience for the will of the legislature. .. ..The widest power of delegation of legislative power must perforce be conceded to our Parliament.

The principles laid down above, formulate the principles to be followed in India, in the case of delegated legislation. I am aware that Patanjali Sastri, C.J. in the *Saurashtra case* (1), doubts whether the majority decision in the *Delhi Laws Act case* (2), lays down any principle which can be of assistance in deciding other cases. I do not however take this to mean that the principles in so far as they were adumbrated by the learned judges, were either incorrect or not to be followed. They are binding upon this Court. Their Lordships have discussed American, Australian and Canadian cases and it is necessary to deal with all of them separately. In the present case, it is said that the Act does not purport to legislate but is merely a pretext for handing over the power of legislation to Government. This is clearly incorrect. As will appear from the principles laid down above, it is sufficient if the policy is laid down and the instrument mentioned, through which the regulations are to be framed. The Act, in my opinion, has clearly laid down a policy, the policy being to introduce control over clinical establishments within the State and to see that they attain a particular standard and are properly conducted. As I have already stated above, such establishments including physical therapy establishments are on an increase of late and it was thought desirable to impose some kind of control over them so that the necessary standards should be maintained. This is done in every civilized state and in this respect our State is not an exception. True that a very wide power of making rules and regulations have been granted to the State Government. But such subordinate legislation is permitted and does not therefore make either the Act or the Rules *ultra vires*. In *Hodge* v. *Queen* (3), the Privy Council upheld the validity of an enactment by a provincial legislature in Canada whereby authority was entrusted to a Board of Commissioners to make regulations in the nature of bye-laws or municipal regulations for the good government of Taverns and thereby to create offences and annex

(1) [1952] S.C.R. 435 (444)
(2) [1951] S.C.R. 747.
(3) (1883) 9 A.C. 117.

penalties thereto. Their Lordships of the Judicial Committee observed as followed:—

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"It was argued at the bar that the legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its power in fact and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies and how long it shall continue them, are matters for such legislature and not for Courts of Law to decide.

In *Shannon's case* (1), a provincial legislature in Canada passed a "Compulsory Marketing Act" providing for the setting up of marketing boards but leaving it to the Government to determine what powers and functions should be given to those boards. The legislation was upheld.

In India, the Essential Supplies (Temporary Powers) Act, 1946 is a piece of legislation which comes very near to the kind of legislation we are considering. It is an Act which by itself is incomplete and merely is an enabling Act giving power to State Government or other authorities or bodies to promulgate orders for the control and supply of essential commodities. As is well known, the real operative part of it is to be found in the orders that have been passed by the different State Governments. In *Ramananda Agarwalla & anr. v. The State* (2), a Full Bench of this High Court held that the power given by section 4 of the Essential Supplies Act to the Government themselves to make orders or to delegate powers to make order to other parties show a delegation of legislative authority but was a valid delegation of such powers. The Central Parliament must be taken to have retained control because these powers to make rules could be taken away from an authority at any moment. It had merely permitted the Central or State Government or officers nominated by either to carry out the policy of the Act.

Various other orders have been promulgated pursuant to the powers conferred by the Essential Supplies Act. For example, the West Bengal Cotton, Cloth and Yarn Control Order, 1948.

(1) [1938] A.C. 708. (2) (1951) 55 C.W.N. 572.

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There, again, the material portion of the law is to be found in the order and not in the Act. In *Mulchand Khatar* v. *The State* (1), a Division Bench of this Court held that there has been neither a delegation or sub-delegation of essential legislative power. It was held that only powers ancillary to essential legislative powers have been conferred on the Central Government by section 3, and on the State Government by section 4 of the Act. These powers are meant to be exercised only to carry out the legislative policy declared in the preamble to the Act. It was further held that, in any case, this was a permissible delegation or sub-delegation of power.

In re: Kalyanam Veerabhadrayya (2), the limits within which delegation of legislative powers are permissible have been summarised as follows:—

> "Power of delegation, however, is recognised, but the question is what are the limits of such delegation. As the legislative power of a Government is vested in the legislature under the Constitution Act, it is not open to the legislature to surrender or abdicate that power or delegate it to another authority, whether it is executive government or some other body. But a legislature is authorised to delegate power which is non-legislative in character. Sometimes the delegated power may be in the nature of conditional legislation authorising an authority, such as the executive, to determine the time of the commencement of an Act, and the area of its application after determining, if necessary, certain facts . . . . . In that case the legislature can just entrust to the subordinate bodies the power of making bye-laws and regulations so as to carry out into execution the Act in which the principles and the policy of the legislature have been laid down with precision. In other words, the legislature by the Act passed by it lays down general principles and the policy leaving out the details to be filled in by regulations or rules by the executive government or some other authority. This form of legislation is described by some text-writers as subordinate legislation and is very often resorted to by the legislatures."

(1) (1952) 56 C.W.N. 789. (2) [1950] A.I.R. Mad. 243.

Mr. Banerjee argues that not only the power of legislation has been delegated to the State Government but that the State Government has in its turn delegated the power to certain officials. For example, Mr. Banerjee says, the Act does not prescribe the conditions which are to be fulfilled for the issue of a licence. For the matter of that, he says, that the rules promulgated also do not lay it down and yet the registration and issue of the licence depends on the subjective satisfaction of the prescribed authority. He says that in this particular case it is said that the petitioners establishment has not got the proper equipments and/or medicines, but nowhere has it been prescribed as to what equipments should be provided or what medicines kept. This kind of subjective satisfaction is by no means an unusual method of legislation. In *Harry Gundling* v. *City of Chicago* (1), it was held that an ordinance giving power to the Mayor to grant licence to sell cigarettes after determining whether a person applying for a licence had good character had reputation and was a suitable person to be entrusted with their sale, was not bad. This case was distinguished from the case of *Yick Wo* v. *Hopkins* (2), where the relevant ordinace conferred upon the municipal authorities arbitrary power at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on laundering, without reference to the competency of the persons applying or the propriety of the place selected.

A consideration of the principles adumbrated above and the authorities cited, show that the Act is not *ultra vires* of the State legislature. The Act has clearly laid down the policy underlying the legislation. The legislature has not parted with its control or its authority, since at any moment the act can be abrogated or repealed. It has not abdicated its constitutional powers. It has laid down principles which are quite intelligible. It has used its discretion in delegating such powers, as are necessary to be delegated, regard being had to the intent and purpose of the enactment and such exercise of discretion is well within the constitutional limits. The enactment satisfies the tests laid down by the Supreme Court mentioned above.

(1) (1900) 177 U.S. 183, 44 L. Ed. 725.
(2) (1886) 118 U.S. 356, 30 L. Ed. 220.

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I now come to point No. 2. Mr. Banerjee argued that the rules were also *ultra vires* because the Act purported to delegate legislative power to the Government who have promulgated these rules in exercise of such delegated power, I have shown above that delegation of legislative power is not by itself unconstitutional. The legislature has not abdicated its functions. Such delegation as has been made is well within the constitutional limits. The rules which have been framed under powers conferred by the Act cannot also be impugned on that ground. Mr. Banerjee argues that the rules purport to redelegate powers which have been delegated to the Government. For example, he says that the Act does not by itself lay down the conditions for the grant of a license. Under rule 11, the licensing authority has to be satisfied that the applicant for the clinical establishments fulfil certain conditions. Firstly, the licensing authority must consider the person or persons associated with the establishment as fit and proper persons (the mistake in the original rule has been corrected by Notification No. 1266/2R—72/50 dated 14th March 1952 by omitting the word "not" which is obviously a mistake).

Next, the licensing authority must be satisfied that the terms and equipments are reasonably suitable and adequate. Thirdly, that the persons employed to conduct the clinical establishments were properly qualified and trained and sufficient in number. There are also other conditions to be satisfied. Mr. Banerjee says that these conditions are entirely vague and depend upon the subjective satisfaction of the licensing authority without laying down any standards. He points out that the rules do not state what equipments were reasonably suitable or adequate. It does not say what number of employees would be considered sufficient, and so on.

There is, in my opinion, no substance in this argument. It has been pointed out above that one of the basic reasons for legislation of the kind we are considering is that the legislature is unable to deal with all the questions that might arise in connection with a particular enactment. In such cases, it is by no means rare to leave the implementation of such details to the subjective satisfaction of responsible persons who are deemed to have the requisite knowledge and experience that are necessary

to accomplish the object of the enactment. It does not amount to a redelegation of legislative power. In *Harry Gundling* v. *City of Chicago* (1), an Ordinance gave power to the Mayor of the City of Chicago to grant licenses authorising the sale of cigarettes within the City of Chicago if he was satisfied that the persons applying for such licenses were of good character and reputation and were suitable persons to be entrusted with the sale of cigarettes. It was held that the ordinance was valid.

In *Plymouth Coal Company* v. *Commonwealth Pennsylvania* (2) a Pennsylvanian Act required the owners of adjoining coal properties to leave a pillar of coal in its seams or veins of coal work along the line of the adjoining property, of such width as will be sufficient barrier for the safety of employees of either mine. What was to be considered a 'sufficient' barrier was left to the determination of the engineers and the adjoining property owners together with the Inspector of the district in which the mine was situated. The Act was upheld.

It must be remembered that the clinical establishments included within the scope of the Act and the Rules are of various kinds. Even in the case of physical therapy establishments, there is bound to be all kinds of institutions,—some big, some small, some specialising in a particular treatment like electro-therapy or hydro-therapy. It is, therefore, scarcely possible to lay down standards applicable to all such establishments. I do not find it unreasonable to leave the determination of such things to the persons having the requisite experience, and they are to determine what was reasonably suitable or adequate for that particular institution. Of course, if such power was exercised malafide or for a collateral purpose, it can always be challenged.

It will be suitable here to deal with point No. 4 and examine the various grounds upon which Mr. Banerjee has attacked the rules to be unworkable. He said that one of the conditions imposed by the Rules upon a Physical Therapy Establishment was that it should be under the direct supervision of a 'properly qualified" expert on the particular kind of treatment given in the establishment. Also, the employees of the establishment and the person or persons giving the actual treatment were to

(1) (1900) 177 U.S. 183; 44 L. Ed. 725.
(2) (1914) 232 U.S. 531; 58 L. Ed. 713.

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have a proper qualification from institutions approved by the State Government for imparting such treatment. So far as the latter class is concerned, the State Government has purported to declare certain institutions as approved, but the qualifications of an expert who has to directly supervise the establishment have nowhere been defined. The result is that it is left to the satisfaction of the licensing authority.

At first sight, this does seem to be an omission. A close analysis of the rules shows the following:—

(1) Rule (11) (i)—"General."—Speaks about persons 'Associated' with the establishment. They must be persons who must be considered fit and proper person by the licensing authority.

(2) Rule 11(v)—"General"—Speaks about persons—'Employed' to conduct the clinical establishment. They must be properly qualified and trained and sufficient in number.

(3) Rule 11(i) "For Physical Therapy Establishment"—Speaks about a person who is directly in charge of the supervision.

He must be a properly qualified expert on the particular kind of treatment given in the establishment.

(4) Rule 11(ii)—"For physical Therapy Establishment"—Speaks of the 'Employees of the establishment and the person or persons giving the actual treatment"—They are to have the proper qualifications from institutions approved by the State Government for imparting such treatment.

The subsequent notifications have approved certain institutions and laid down certain qualifications. It will be noticed however that they deal with the employees of the establishment and the person or persons giving the actual treatment, i.e. heading No. 4. Nothing is said about heading (1) (2) or (3). It may well be asked whether a person 'conducting' the establishment

is the same as the person "directly in supervision" or whether such persons are to be deemed as coming under the category of persons employed by the establishment or as imparting actual treatment. In my opinion, these various expressions have been used without much care on the part of the draughtsman, but the intenion is perfectly clear. If a too strict interpretation is given, then we do come to absurd results. It is said that all employees must have a prescribed qualification—but that cannot include the clerks or accountant or the durwan and the sweeper. Then again the words "associated with the Establishment" might mean anything. It might mean that the licensing authority has got to approve of the grocer who supplies the groceries or the solicitor who represents it in the courts. This is an absurdity. The intention must be that all those who carry on the establishment in its real work of imparting treatment, and this would include those who conduct or supervise the treatment or those who impart such treatment (e.g. Doctors, masseur, masseuse, nurses) should have the necessary technical qualifications. In other words, the act aims at controlling a technical body and it speaks about those who are connected with the technical side of it and not others. And all such persons come under category (4) the words being used there in the sense indicated above.

I think it is reasonably clear what the rules mean to lay down, namely that the employees of the establishment including the person or persons giving the actual treatment who are in any way connected with the various stages of the particular treatment given in that institution (including the persons conducting or supervising such treatment) should be properly qualified for the purposes of carrying out efficiently the particular task allotted to that person. It has no reference to purely ministerial or non-ministerial staff, who are unconnected with the actual treatment For example, neither a clerk keeping the accounts nor a menial can be exepected to have qualifications from approved institutions. But even if the qualifications to be possessed by an expert or a person conducting the establishment, be dependant upon the subjective satisfaction of the licensing authority, I would not consider it to be fatal. As I have already pointed out, a physical therapy establishment may be of many kinds and the qualifications required would accordingly vary, depending as it does upon the particular kinds of treatment meted out therein. There is nothing unreasonable in leaving it to the

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licensing authority to determine whether the expert or the person conducting or supervising the institution has enough knowledge of the treatment which is imparted. I hold therefore that the rules are neither *ultra vires* nor unworkable. The last part of point 2 namely that the rules were outside the four corners of the Act is really connected with point No. (3). Except the impugned notifications, nothing has been placed before me to show that the Rules are outside the scope of the Act itself.

I therefore come to point No. (3). The notifications which are impugned are Nos. PH. 2201/2A-9/52, PH 2210/2A-9A/52 and PH. 2211/2A-9/52 all dated 9th August 1952. They were all published in an Extraordinary Gazette dated August 11, 1952. The first named notification purports to be in exercise of the power conferred by clause (ii) of the entries under the heading "for physical therapy establishments" in rule 11 of the Rules, and gives a list of approved institutions. The second notification purports to be in exercise of the power conferred by section 9 of the Act. It makes an amendment in rule 11 of the Rules. The third notification mentioned above, purports to be in exercise of the power conferred by sub-clause (a) of clause (iii) of the entries under the heading "for physical therapy establishment" in rule 11 of the Rules. By these notifications, regulations have been framed determining the qualifications which person or persons giving the actual treatment should possess. Notification PH. 2201/2A-9/52 gives a list of the approved Institutions which are all foreign institutions. Certain relaxation have however been made by the subsequent notifications, and persons not having foreign qualifications are also allowed to import treatment provided they complied with regulations made by the State Government on this behalf. In fact, the last named notification prescribes such regulations.

Mr. Banerjee's complaint is that the only rule-making power under the Act is section 9. He says that the notifications purport to make rules and/or regulations under rule 11 of the Rules, but this is incompetent. In my opinion, this point has no substance. So far as the first-named notification is concerned, it does not purport to make any rule at all. It is only an administrative act specifying the institutions which were approved by the government. The second-named notification

has correctly referred to section 9. This notification amends Rule 11 (iii). By this amendment, rule 11 (iii) (a) has been incorporated and gives power to the Government to determine the qualifications by framing regulations. The last notification frames these Regulations and consequently refers to rule 11 (iii) (a), because the power to frame regulations prescribing the qualifications is derived from that rule.

I now come to point No. (5). Mr. Banerjee argues that under section 8(d) of the Act, a chamber or clinic of a registered medical practitioner is exempt. He says that if there is a doctor connected with the establishment, then this is sufficient to exempt the establishment from the operation of the Act or Rules.

Both Mr. Banerjee and Mr. Sen have placed before me the different kinds of meaning attributed to the word "Clinic," both in the ordinary as well as in the medical sense. Mr. Banerjee argues that any place where a doctor sees his patients is his chamber and wherever he treats his patient is his clinic.

Mr. Sen points out that not only must it be a chamber or a clinic of a registered medical practitioner but it is also to be a physical therapy establishment. He says that the Rules are not satisfied if a doctor is attached to a physical therapy establishment in the sense that he occasionally comes there and either supervises the running of the institution or imparts treatment.

I must confess that the use of the word "clinic" in section 8 (2) (d) is unfortunate. It is not quite clear whether a "clinic" is meant to be different from a "clinical establishment." It must be borne in mind that the word "clinic" is not used in this country in a particular sense, but is applied to a variety of Institutions. In my opinion, however, it is quite clear that a "Chamber" or a "Clinic" to be exempt must belong to a registered medical practitioner and that it will not include the case where a medical practitioner is merely attached to the particular establishment. Mr. Sen has admitted that if a registered medical practitioner carries on a physio-therapy establishment within his chamber, that will possibly be exempt. It seems to me that unless the word "clinic" is defined to be something

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other than a clinical establishment, it is quite arguable that the effect of section 8 (2) (d) is to exempt the chamber and/or a clinic run by a registered medical practitioner and that the latter term would include a clinical establishment belonging to and run by a registered medical practitioner. Whether it was really intended to arrive at this result is more than I can say. It is not unreasonable to think that the legislature contemplated that the rigours of control inherent in the registered and licensing of institutions is not necessary where such an institution is owned and run by a properly qualified person like a registered medical practitioner. But even if we accept the above interpretation, the petitioner's institution does not come within the exemption. Here there is a L.M.F. doctor who only attends two hours daily and there is nothing to show that the physiotherapy establishment constitutes either his chamber or clinic.

I now come to point No. 6 which must be dealt together with point No. 8. The argument is that the Act and the rules do not prescribe any standard for either the house in which the physical therapy establishment is to be located nor does it prescribe any list of equipment, which are thus left to the subjective satisfaction of an individual. This point has already been discussed above. Regard being had to the variety of such establishments and the variety of treatment carried on therein, it has not been found feasible for the legislature itself to lay down the standard, which has been left to the subjective satisfaction of officers competent to judge the adequacy of the same. As I have already pointed out, there is nothing inherently unconstitutional or illegal in this. I hope that at some early date, the authorities would find it possible to lay down the minimum standards in all such establishments, so that a person contemplating to start such an establishment might know exactly where he stands At the moment however I am unable to hold that the Act or Rules are unconstitutional or invalid because no standards have been laid down. So far as the qualification of personnel is concerned, this matter has already been discussed above. The Act read with the rules, does lay down the qualifications. I do not see why it is said that the qualifications, as laid down are vague. It is said that the approved Institutions are all foreign and that the modification made in the regulations are illusory inasmuch as no such qualified persons exist in India. So far as

the first point is concerned, I have already dealt with this in my judgment in *Tara Charan Mukherjee* v. *B. C. Das Gupta & Ors.* (1), and do not find it necessary to repeat myself. Modern science is making rapid strides in medical treatment. So far, our own contribution to it has been insignificant. If we import western discoveries in medical science, we must also import the correct technique of it. Until our own medical colleges or medical institutions are in a position to impart such training, I find nothing unreasonable in preserving foreign qualifications as essential. I have no doubt that in the years to come, our own country will have established properly qualified institutions to impart such training and such institutions will be included within list of "approved institutions." In the affidavit-in-opposition affirmed by the Deputy Director of Health Services (administration) paragraphs 10 and 11, it is definitely stated that properly qualified persons are available in India and that there exist physio-therapy departments in the Government Hospitals at Bombay, Madras and Patiala where the requisite training is imparted. In my opinion there has been no proper traverse of this in the affidavit in-reply, which merely throws a challenge to furnish evidence of such allegation and makes no admission. The statement made in the affidavit in opposition was of a fact, which could have easily been verified. It could have been said in reply that there are no Government Hospitals in any of the places named (A very unlikely thing) or that such Government hospitals have no physio-therapy departments or that if such department exist no one is allowed to be trained therein. In the absence of such a traverse, I am inclined to accept the facts stated in the affidavit in opposition.

Then again, I have entirely failed to appreciate how the "approved institutions" have not been properly specified. It is argued the the words "similar other Association," leave it uncertain as to what institutions are meant. This argument is unsubstantial. I have already pointed out that 'physical therapy' has now come to be an accepted branch of medical treatment. It has many remifications but I do not think that any doubt exists among medical men as to the exact nature of this particular kind of treatment. The two institutions specifically named are the outstanding institutions of their kind, in

(1) (1953) 92 C.L.J. 17 (22).

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two of the most advanced countries in the world. There is consequently no vagueness at all in including "similar institutions," in other countries within the purview of "approved institutions."

Next I come to point No. 9, that the Act or the rules infringe article 19(1) (G) of the Constitution. This again is a point which I have already dealt with in *Tara Charan Mukherjee* v. *B. C. Das Gupta & Ors.* (1), and do not find it necessary to repeat the same here. The point is covered by Article 19(6), which confers upon the State the right to prescribe the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

In passing I must mention that Mr. Banerjee attempted to argue a point which I was entirely unable to appreciate. He said that the State legislature was incapable of prescribing a "foreign" qualification and what the legislature could not do, the State Government, its delegate could not do. Mr. Banerjee conceded that under Schedule 7 List II, item 6 of the Constitution—"Public Health" was a State subject. He however argued that in dealing with foreign qualifications, the State legislature (and therefore the State Government as its delegate) would be dealing with something which has extra-territorial operation and under article 245, only the Central Legislature is capable of doing this. This argument proceeds on an entire misconception of what constitutes extra-territorial operation of a law. This State legislature (or its delegate) in prescribing foreign qualification is not imposing on the law of any foreign territory or making any law that will operate beyond its own borders. But within its borders, and within the four corners of the powers conferred by the Constitution, it is fully competent to take cognisance of a foreign qualification, that does not constitute extra territorial legislation by any stretch of imagination.

I now come to point 7. Mr. Banerjee argues that the examinations held in the Writers' Building are not valid because the examiners are not competent examiners holding no qualification to examine on the subject of "Physio-therapy," and also not authorised to act as examiners under the relevant regulations. He also argues that the dates of holding such examinations have not been properly Gazetted. This argument makes

(1) (1953) 92 C.L.J. 17 (21).

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a confusion between two things. One is the right to prescribe such a test at all and the other is the validity of a particular test according to the rules and regulations governing it. In this application I am concerned with the former and not with the latter. If a particular test examination is not in conformity with the regulations as prescribed, then a person affected by the same, e.g. a candidate offering himself for such a test, might come forward and challenge the same. But there is no such application before me. No such complaint has been made in the petition and it is not one of the grounds upon which the rule has been issued. I think Mr. Sen was quite justified in saying that he was not called upon to meet this point in this application.

Apart from this, I do not see why the test itself is unauthorised, regard being had to the provisions of the Regulations, proviso (ii).

I next come to point No. 10 and 11. I have already mentioned that the refusal to grant a license dated 30th October, 1952, was signed by A. Sen as the License Issuing Authority which description was incorrect because he is the 'licensing Authority.' This mistake was corrected by letter dated the 25th November, 1952. It is argued that upon such a fundamental point, a correction was not permissible and the whole order of rejection should have been repeated. I cannot accept this argument, I do not see why a mistaken description of the office held by the licensing authority (it is not denied that he was the licensing authority), vitiates the rejection order, when the error was promptly rectified. The only statutory requirement for an order of rejection is that grounds should be given. I find nothing so very sacrosanct in an order of rejection, that an error in it in the description of the officer signing it cannot be rectified.

I hold therefore that the rejection of the petitioner's application is in compliance with the Act and the rules. Another point made point No. 11 is as follows:—It is argued that the Inspecting officer made a report on the 13th August, 1952, and refused to recommend the grant of a license. Item 13 of the Report is—"Remarks of the licensing authority" and against it is an indorsement "License refused" signed by the Licensing authority. It is argued that this indorsement alone constitutes the order of rejection and since it does not record

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reasons, it is bad under section 4 (3) of the Act. I think this is a very narrow way of interpreting the section. There is nothing to indicate that an indorsement in the inspection report must give reasons. Such an indorsement is required to be put in by the official form of the Inspection report, by way of a remark. The real order is contained in the letter dated the 30th October 1952, which contains the reasons for the rejection of the application for the issue of a license. In any event, the indorsement on the inspection report dated the 24th October, 1952, and the letter dated the 30th October, 1952, can easily be read together and when so read, clearly satisfies the provisions of section 4(3) of the Act.

Lastly I come to point 12. Mr. Banerjee argues that a clear discrimination has been made between a citizen possessing a foreign qualification and a citizen not possessing the same. Except in a very narrow sphere, which I shall presently mention, I do not see how the question of discrimination arises at all. It is the case of the petitioner that in India there are no institutions imparting the requisite standard of training and no trained personnel. It follows that the question of discrimination does not arise at all. One can only discriminate between two persons of the same category. If one is superior to the other, it only means giving recognition to the more deserving.

It is by now well established that discrimination which is based on a rational classification is quite valid. Assuming therefore that the foreign qualification is of a higher standard, (not to speak of the case where no such qualification can be obtained at all locally) there can be no question of discrimination in giving it preference.

There is however one narrow ground in which it seems to me that the rules have proceeded on a classification which is not rational and it is this. Under rule 11 (11), the qualification for employment and imparting actual treatment must be from an approved institution, which under Notification PH2209/2A-9/52, are all foreign institutions. This rigour has however been mitigated by an amendment of sub-rule (iii) read with the regulations framed thereunder. Thus a matriculate who possessed practical experience for a period of five years as a trainee or assistant to a qualified physio-therapist in the Physio-therapy Department of a Government Hospital or a hospital recognised by the State Government, and who possesses satisfactory know-

ledge of certain specified subjects, is a person who is entitled to be employed in the establishment or to impart actual treatment. But in the latter case separate arrangements must be made for treatment of male patients and female patients. In other words, a male person with a foreign qualification can treat a female patient but a male person with an Indian qualification can not treat a female patient. There seems to be no rational basis whatsoever for this classification, unless we presume that basically we have no moral fibre at all and we can only acquire the same by going to foreign countries and obtaining foreign education. I am happy to say that Mr. Sen has not asked me to make any such assumption. But he has answered this point in another way. He says that assuming this is discrimination, who can complain? As Das J., has pointed out in *Chiranji Lall's case* (1), only the person who is directly affected by the discrimination can complain of it. Here the petitioner's application was rejected because he had no qualified personnel at all, and not because he had persons with Indian qualifications who were attempting to treat patients of the other sex. Where such a contingency arises, the point will arise for determination and not in the present application. On the facts of this particular case I do not see how the provisions of article 14 of the Constitution have at all been violated.

Before concluding I must mention that Mr. Banerjee complained that the authorities were forcing his client to give inspection of books which he was not compelled to give inspection of, under the rules. This however is not a ground of complaint in the petition and Mr. Sen has rightly objected to my dealing with it in this application. That can only be dealt with in a properly framed application.

The result is that all the points raised have failed and I find no reason to revise my decision in *Tara Charan Mukherjee v. B. C. Das Gupta and ors.* (2). This application must therefore be dismissed. The rule will be discharged and all interim orders if any, vacated.

Regard being had to the complexity of the questions involved, I make no order as to costs.

R. M. Kar: Solicitor for the Petitioner.

N. C. Mitra: Solicitor for the Respondents.

S.C.P. *Application dismissed.*

(1) [1951] A.I.R. (S.C.) 4. (2) (1953) 92 C.L.J. 17 at pp. 21.

SUPREME COURT.

Before Mr. Justice B. K. Mukherjea, Mr. Justice Vivian Bose and Mr. Justice N. H. Bhagwati.

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November, 16.

SATYA BRATA GHOSH

v.

MUGNEERUM BANGUR & CO. & ANR.*

Contract—Doctrine of frustration—Section 56 of the Indian Contract Act, whether the provisions thereof oust the doctrine of frustration of contract—Impossibility of performance of contract, the basis of the doctrine of frustration.

Contract—Contract for sale of land—Whether the doctrine of frustration operates in case of such contract—Difference between the English and Indian Law—Section 54 of the Transfer of Property Act.

Contract—"Reasonable time," judicial interpretation of—Contract for the sale of land after development by the seller—War-time requisition of the land—Absence of time limit—Whether War-time temporary requisition orders made the contract impossible of performance.

The essential idea upon which the doctrine of frustration of contract is based is that of impossibility of performance of contract. The doctrine comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. In fact, impossibility and frustration are often used as interchangeable expressions.

The word "impossible" in Section 56 of the Indian Contract Act has not been used in the sense of physical or literal impossibility. The performance of an Act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.

* Supreme Court Civil Appeal No. 80 of 1952, from the Judgment and Decree dated the 6th September 1950 of the High Court of Judicature at Calcutta (*Das Gupta and Lahiri JJ.*) in Appeal from Appellate Decree No. 318 of 1949 from the Judgment and Decree dated the 25th February 1949 of the Court of the District Judge of Zillah 24-Parganas in Title Appeal No. 8 of 1948 arising out of the Judgment and Decree dated the 10th October, 1947, of the Court of the Additional Subordinate Judge, 7th Court, Alipore.

The doctrine of frustration is really an aspect or part of the law of discharge of Contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility. In deciding cases in India the only doctrine that the Court has to go by is that of supervening impossibility or illegality, as laid down in Section 56 of the Contract Act, taking the word impossible in its practical and not literal sense. It must be borne in mind, however, that Section 56 of the Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The belief, knowledge and intention of the parties are evidence, but evidence only on which the Court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying objects.

It must, however, be pointed out that if the parties do contemplate the possibility of an intervening circumstances which might affect the performance of the contract but expressly stipulate that the contract would stand despite such circumstances, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens.

Under the English law as soon as there is a concluded contract for sale of land, the party contracting to purchase becomes, in equity, the owner of the land subject to his obligation to pay the purchase money and the seller holds the same in trust for the purchaser. But in India, a contract for sale of land does not of itself create any interest in the property which is the subject-matter of the contract. In India, the obligations of the parties to a contract for sale of land are, therefore, the same as in other ordinary contracts and consequently there is no conceivable reason why the doctrine of frustration should not be applicable to contracts for sale of land in India.

When there is no time limit whatsoever in the contract, nor even an understanding between the parties on this point and when during the war parties could naturally anticipate restrictions of various kinds which would make the carrying on these operations more tardy and difficult than in peace time, the order of requisition cannot be held to have affected the fundamental basis upon which the agreement rested or to have struck at the roots of the adventure.

Appeal by the Plaintiff.

Suit for a declaration that the contract for sale of land was subsisting.

Plea of frustration of contract by the Defendant.

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Satya Brata Ghosh v. Mugneeram Bangur & Co

November, 16.

The material facts will appear from the judgment.

M. C. Setalvad, Attorney-General for India, Aurobinda Guha and Gobinda Mohan Roy for the Appellant.

Atul Chandra Gupta, Bijan Behari Das Gupta, for the Respondent No. 1.

The Judgment of the Court was delivered by—

Mukherjea, J.:—The facts giving rise to this appeal are, for the most part, uncontroverted and the dispute between the parties centres round the short point as to whether a contract for sale of land to which this litigation relates, was discharged and came to an end by reason of certain supervening circumstances which affected the performance of a material part of it.

To appreciate the merits of the controversy, it will be necessary to give a brief narrative of the material facts. The defendant company, which is the main respondent in this appeal, is the owner of a large tract of land situated in the vicinity of the Dhakuria Lakes within Greater Calcutta. The company started a scheme for development of this land for residential purposes which was described as Lake Colony Scheme No. 1 and in furtherance of the scheme the entire area was divided into a large number of plots for the sale of which offers were invited from intending purchasers. The company's plan of work seemed to be, to enter into agreements with different purchasers for sale of these plots of land and accept from them only a small portion of the consideration money by way of earnest at the time of the agreement. The company undertook to construct the roads and drains necessary for making the lands suitable for building and residential purposes and, as soon as they were completed, the purchaser would be called upon to complete the conveyance by payment of the balance of the consideration money. Bejoy Krishna Roy, who was defendant No. 2 in the suit and figures as a *pro forma* respondent in this appeal, was one of such purchasers who entered into a contract with the company for purchase of a plot of land covered by the scheme. His contract is dated the 5th of August, 1940, and he paid Rs. 101 as earnest money. In the receipt granted by the vendor for this earnest money, the terms of the agreement are thus set out:—

"Received with thanks from Babu Bejoy Krishna Roy of 28, Tollygunge Circular Road, Tollygunge, the sum of Rs. 101 (Rupees one hundred and one only) as earnest money having agreed to sell to him or his nominee 5 K. more or less in plot No. 76 on 20 and 30 ft. Road in Premises No. Lake Colony Scheme No. 1, Southern Block at the average rate of Rs. 1,000 (Rupees one thousand only) per Cotta.

"The conveyance must be completed within one month from the date of completion of roads on payment of the balance of the consideration money, time being deemed as the essence of the Contract. In case of default this agreement will be considered as cancelled with forfeiture of earnest money.

"Mokarari Mourashi.

"Terms of payment:—One-third to be paid at the time of registration and the balance within six years bearing Rs. 6 per cent. interest per annum."

On November 30, 1941 the plaintiff appellant was made a nominee by the purchaser for purposes of the contract and although he brought the present suit in the character of a nominee, it has been held by the trial judge as well as by the lower appellate court, that he was really an assignee of Bejoy Krishna Roy in respect to the latter's rights under the contract. Some time before this date, there was an order passed by the Collector, 24-Parganas, on 12th of November 1941, under section 79 of the Defence of India Rules, on the strength of which a portion of the land covered by the scheme was requisitioned for military purposes. Another part of the land was requisitioned by the Government on 20th of December 1941; while a third order of requisition, which related to the balance of the land comprised in the scheme, was passed sometime later. In November 1943 the company addressed a letter to Bejoy Krishna Roy informing him of the requisitioning of the lands by the Government and stating *inter alia* that a considerable portion of the land appertaining to the scheme was taken possession of by the Government and there was no knowing how long the Government would retain possession of the same. The construction of the proposed roads and drains, therefore, could not be taken up

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during the continuance of the war and possibly for many years after its termination. In these circumstances, the company decided to treat the agreement for sale with the addressee as cancelled and give him the option of taking back the earnest money within one month from the receipt of the letter. There was an offer made in the alternative that in case the purchaser refused to treat the contract as cancelled, he could, if he liked, complete the conveyance within one month from the receipt of the letter by paying the balance of the consideration money and take the land in the condition in which it existed at that time, the company undertaking to construct the roads and the drains, as circumstances might permit, after the termination of the war. The letter ended by saying that in the event of the addressee not accepting either of the two alternatives, the agreement would be deemed to be cancelled and the earnest money would stand forfeited. This letter was handed over by Bejoy Krishna to his nominee, the plaintiff, and there was some correspondence after that, between the plaintiff on the one hand and the company on the other through their respective lawyers into the details of which it is not necessary to enter. It is enough to state that the plaintiff refused to accept either of the two alternatives offered by the company and stated categorically that the latter was bound by the terms of the agreement from which it could not, in law, resile. On 18th of January 1946 the suit, out of which this appeal arises, was commenced by the plaintiff against the defendant company, to which Bejoy Krishna Roy was made a party defendant and the prayers in the plaint were for a two-fold declaration, namely, (1) that the contract dated the 5th of August 1940 between the first and the second defendant, or rather his nominee, the plaintiff, was still subsisting; and (2) that the plaintiff was entitled to get a conveyance executed and registered by the defendant on payment of the consideration money mentioned in the agreement and in the manner and under the conditions specified therein.

The suit was resisted by the defendant company who raised a large number of defences in answer to the plaintiff's claim, most of which are not relevant for our present purpose. The principal contentions raised on behalf of the defendant were that a suit of this description was not maintainable under section 42 of the Specific Relief Act and that the plaintiff had no

locus standi to institute the suit. The most material plea was that the contract of sale stood discharged by frustration as it became impossible by reason of the supervening events to perform a material part of it. Bejoy Krishna Roy did not file any written statement and he was examined by the plaintiff as a witness on his behalf.

The trial judge by his judgment dated October 10, 1947 overruled all the pleas taken by the defendant and decreed the plaintiff's suit. An appeal taken by the defendant to the court of the District Judge of 24 Parganas was dismissed on the 25th February 1949 and the judgment of the trial court was affirmed. The defendant company thereupon preferred a second appeal to the High Court which was heard by a Division Bench consisting of Das Gupta and Lahiri, JJ. The only question canvassed before the High Court was, whether the contract of sale was frustrated by reason of the requisition orders issued by the Government? The learned Judges answered this question in the affirmative in favour of the defendant and on that ground alone dismissed the plaintiffs suit. The plaintiff has now come before us on the strength of a certificate granted by the High Court under Article 133 (1) (c) of the Constitution of India.

The learned Attorney General, who appeared in support of the appeal, has put forward a three-fold contention on behalf of his client. He has contended in the first place that the doctrine of English law relating to frustration of contract, upon which the learned Judges of the High Court based their decision, has no application to India in view of the statutory provision contained in section 56 of the Indian Contract Act. It is argued in the second place, that even if the English law applies, it can have no application to contracts for sale of land and that is in fact the opinion expressed by the English Judges themselves. His third and the last argument is that on the admitted facts and circumsances of this case there was no frustrating event which could be said to have taken away the basis of the contract or rendered its performance impossible in any sense of the word.

The first argument advanced by the learned Attorney General raises a somewhat debatable point regarding the true

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scope and effect of section 56 of the Indian Contract Act and to what extent, if any, it incorporates the English rule of frustration of contracts.

Section 56 occurs in Chapter IV of the Indian Contract Act which relates to performance of contracts and it purports to deal with one class of circumstances under which performance of a contract is excused or dispensed with on the ground of the contract being void. The section stands as follows:—

"An agreement to do an act impossible in itself is void.

A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumsances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promissor finds it impossible to do the act which he promised to do.

Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The parties shall be excused, as Lord Loreburn says [*See Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (1)]:

> "If substantially the whole contract becomes impossible of performance or in other words *impracticable* by some cause for which neither was responsible."

In *Joseph Constantine Steamship Line Limited* v. *Imperial Smelting Corporation Ltd.* (2), Viscount Maugham observed that the "doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made." Lord Porter agreed with this view and rested the doctrine on the same basis. The question was considered and discussed by a Division Bench of the Nagpur High Court in *Kesarichand* v. *Governor General in Council* (3), and it was held that the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. The doctrine is a special case of impossibility and as such comes under section 56 of the Indian Contract Act. We are in entire agreement with this view which is fortified by a recent pronouncement of this court in *Ganga Saran* v. *Ram Charan* (4), where Fazl Ali, J., in speaking about frustration observed in his judgment as follows:

> "It seems necessary for us to emphasise that so far as the courts in this country are concerned, they must look primarily to the law as embodied in sections 32 and 56 of the Indian Contract Act, 1872."

(1) [1916] 2 A.C. 397, 403.
(2) [1942] A.C. 154 (168).
(3) [1949] I.L.R. Nag. 718.
(4) [1952] S.C.R. 36 (42).

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We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of section 56 of the Indian Contract Act. It would be incorrect to say that section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also, that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law *dehors* these statutory provisions. The decisions of the English courts possess only a persuasive value and may be helpful in showing how the courts in England have decided cases under circumstances similar to those which have come before our courts.

It seems necessary however to clear up some misconception which is likely to arise because of the complexities of the English law on the subject. The law of frustration in England developed, as is well known, under the guise of reading implied terms into contracts. The court implies a term or exception and treats that as part of the contract. In the case of *Taylor* v. *Caldwell* (1), Blackburn, J. first formulated the doctrine in its modern form. The court there was dealing with a case where a music hall in which one of the contracting parties had agreed to give concerts on certain specified days was accidentally burnt by fire. It was held that such a contract must be regarded "as subject to an *implied condition* that the parties shall be excused, in case, before breach, performance becomes *impossible* from perishing of the thing without default of the contractor." Again in *Robinson* v. *Davison* (2) there was a contract between the plaintiff and the defendant's wife (as the agent of her husband) that she should play the piano at a concert to be given the plaintiff on specified day. On the day in question she was unable to perform through illness. The contract did not contain any term as to what was to be done in case of her being too ill to perform. In an action against the defendant for breach of contract,

(1) (1863) 3 B. & S. 826.
(2) (1871) L.R. 6 Exch. 269.

it was held that the wife's illness and the consequent incapacity excused her and that the contract was in its nature not absolute but conditional upon her being well enough to perform. Bramwell. B. pointed out in course of his judgment that in holding that the illness of the defendant incapacitated her from performing the agreement the court was not really engrafting a new term upon an express contract. It was not that the obligation was absolute in the original agreement and a new condition was subsequently added to it; the whole question was whether the original contract was absolute or conditional and having regard to the terms of the bargain, it must be held to be conditional.

The English law passed through various stages of development since then and the principles enunciated in the various decided authorities cannot be said to be in any way uniform. In many of the pronouncements of the highest courts in England the doctrine of frustration was held "to be a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands" *Vide Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (1). The court, it is said, cannot claim to exercise a dispensing power or to modify or alter contracts. But when an unexpected event or change of circumstance occurs, the possibility of which the parties did not contemplate, the meaning of the contract is taken to be not what the parties actually intended, but what they as fair and reasonable men would presumably have intended and agreed upon, if having such possibility in view, they had made express provision as to their rights and liabilities in the event of such occurrence: *Vide Dahl* v. *Nelson, Donkin* (2). As Lord Wright observed in *Joseph Constantine Steamship Co.* v. *Imperial Smelting Corporation Ltd* (3):

> "In ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide not what the parties actually intended but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man."

(1) [1926] A.C. 497 at 510.
(2) (1881) 6 A.C. 38 at 59.
(3) [1942] A.C. 154 at 185.

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Lord Wright clarified the position still further in the later case of *Denny, Mott and Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* (1), where he made the following observations:

"Though it has been constantly said by High authority, including Lord Sumner, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would as hard bargainers, have agreed. The doctrine is invented by the court in order to supplement the defects of the actual contract . . . . To my mind the theory of the implied condition is not really consistent with the true theory of frustration. It has never been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation."

In the recent case of *British Movietonews Ld.* v. *London and District Cinemas Ld.* (2), Denning, L. J. in the Court of Appeal took the view expressed by Lord Wright as stated above as meaning that "the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation." "The day is gone" the learned Judge went on to say, "when we can excuse an unforeseen injustice by saying to the sufferer 'it is your own folly, you ought not to have passed that form of words. You ought to have a put in a clause to protect yourself.' We no longer credit a party with the foresight of a Prophet or his lawyer with the draftsmanship of a Chalmers. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that he who clings to the letter clings to the dry and barren shell and misses the truth and substance of the matter. We have of late paid heed to this warning, and we must pay like heed now."

(1) [1944] A.C. 265 at 275.

(2) [1951] 1 K.B. 190.

This decision of the Court of Appeal was reversed by the House of Lords and Viscount Simon in course of his judgment expressed disapproval of the way in which the law was stated by Denning, L. J. It was held that there was no change in the law as a result of which the courts could exercise a wider power in this regard than they used to do previously. "The principle remains the same" thus observed His Lordship. "Particular applications of it may greatly vary and theoretical lawyers may debate whether the rule should be regarded as arising from implied term or because the basis of the contract no longer exists. In any view, it is a question of construction as Lord Wright pointed out in *Constantine's case* (1) and as has been repeatedly asserted by other masters of law (2)."

These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the Contract Act, taking the word "impossible" in its practical and not literal sense. It must be borne in mind, however, that section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

In the latest decision of the House of Lords referred to above, the Lord Chancellor puts the whole doctrine upon the principle of construction. But the question of construction may manifest itself in two totally different ways. In one class of cases the question may simply be as to what the parties themselves had actually intended; and whether or not there was a condition in the contract itself, express or implied, which operated, according to the agreement of the parties themselves, to release them from their obligations; this would be a question of construction pure and simple and the ordinary rules of construction would have to be applied to find out what the real intention of the parties was. According to the Indian Contract Act, a promise may be express or implied (3). In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of

(1) [1942] A.C. 154. (2) [1952] A.C. 166 at 184.
(3) Vide Section 9.

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certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under section 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act. In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumsances destroyed altogether the basis of the adventure and its underlying object: *Vide Morgan* v. *Mansur* (1). This may be called a rule of construction by English Judges but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of section 56 of the Indian Contract Act.

It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of

(1) [1947] A.E.R. 666.

the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in *Matthey v. Curling* (1), "a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies or *vis major*." This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of section 56 of the Indian Contract Act cannot be accepted.

The second contention raised by the Attorney-General can be disposed of in few words. It is true that in England the judicial opinion generally expressed is, that the doctrine of frustration does not operate in the case of contract for sale of land: *vide Billington Estates Co. v. Stonefield Estates, Ltd.* (2). But the reason underlying this view is that under the English law as soon as there is a concluded contract by A to sell land to B at certain price, B becomes, in equity, the owner of the land subject to his obligation to pay the purchase money. On the other hand, A in spite of his having the legal estate holds the same in trust for the purchaser and whatever rights he still retains in the land are referable to his right to recover and receive the purchase money. The rule of frustration can only put an end to purely contractual obligations; but it cannot destroy an estate in land which has already accrued in favour of a contracting party. According to the Indian law, which is embodied in section 54 of the Transfer of Property Act, a contract for sale of land does not of itself create any interest in the property which is the subject-matter of the contract. The obligations of the parties to a contract for sale of land are, therefore, the same as in other ordinary contracts and consequently there is no conceivable reason why the doctrine of frustration should not be applicable to contracts for sale of land in India. This contention of the Attorney-General must, therefore, fail.

We now come to the last and most important point in this case which raises the question as to whether, as a result of the requisition orders, under which the lands comprised in the de-

(1) [1922] 2 A.C. 180 (234). (2) [1952] 1 A.E.R. 853.

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velopment scheme of the defendant company were requisitioned by Government, the contract of sale between the defendant company and the plaintiff's predecessor stood dissolved by frustration or in other words became impossible of performance.

It is well settled and not disputed before us that if and when there is frustration the dissolution of the contract occurs automatically. It does not depend, as does recission of a contract on the ground of repudiation or breach, or on the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract: Per Lord Wright in *Denny, Dolt & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* (1). What happens generally in such cases and has happened here is that one party claims that the contract has been frustrated while the other party denies it. The issue has got to be decided by the court '*ex post facto*' on the actual circumstances of the case (2).'

We will now proceed to examine the nature and terms of the contract before us and the circumstances under which it was entered into to determine whether or not the disturbing element which is alleged to have happened here, has substantially prevented the performance of the contract as a whole.

It may be stated at the outset that the contract before us cannot be looked upon as an ordinary contract for sale and purchase of a piece of land; it is an integral part of a development scheme started by the defendant company and is one of the many contracts that have been entered into by a large number of persons with the company. The object of the company was undoubtedly to develop a fairly extensive area which was still undeveloped and make it useable for residential purposes by making roads and constructing drains through it. The purchaser, on the other hand, wanted the land in regard to which he entered into the contract to be developed and made ready for building purposes before he could be called upon to complete the purchase. The most material thing which deserves notice is, that there is absolutely no time limit within which the roads and drains are to be made. The learned District Judge of Alipore, who heard the appeal, from the trial court's judgment found-

(1) [1944] A.C. 265 (274). (2) Ibid.

it as a fact, on the evidence in the record, that there was not even an understanding between the parties on this point. As a matter of fact, the first requisition order was passed nearly 15 months after the contract was made and apparently no work was done by the defendant company in the mean time. Another important thing that requires notice in this connection is that the war was already on, when the parties entered into the contract. Requisition orders for taking temporary possession of lands for war purposes were normal events during this period. Apart from requisition orders there were other difficulties in doing construction work at that time because of the scarcity of materials and the various restrictions which the Government had imposed in respect of them. That there were certain risks and difficulties involved in carrying on operations like these, could not but be in the contemplation of the parties at the time when they entered into the contract, and that is probably the reason why no definite time limit was mentioned in the contract within which the roads and drains are to be completed. This was left entirely to the convenience of the company and as a matter of fact the purchaser did not feel concerned about it. It is against this background that we are to consider to what extent the passing of the requisition orders affected the performance of the contract in the present case.

The company, it must be admitted, had not commenced the development work when the requisition order was passed in November 1941. There was no question, therefore, of any work or service being interrupted for an indefinite period of time. Undoubtedly the commencement of the work was delayed but was the delay going to be so great and of such a character that it would totally upset the basis of the bargain and commercial object which the parties had in view? The requisition orders, it must be remembered, were, by their very nature, of a temporary character and the requisitioning authority could, in law, occupy the position of a licensee in regard to the requisitioned property. The order might continue during the whole period of the war and even for some time after that or it could have been withdrawn before the war terminated. If there was a definite time limit agreed to by the parties within which the construction work was to be finished, it could be said with perfect propriety that delay for an indefinite period would make the

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performance of the contract impossible within the specified time and this would seriously affect the object and purpose of the venture. But when there is no time limit whatsoever in the contract, nor even an understanding between the parties on that point and when during the war the parties could naturally anticipate restrictions of various kinds which would make the carrying on of these operations more tardy and difficult than in times of peace, we do not think that the order of requisition affected the fundamental basis upon which the agreement rested or struck at the roots of the adventure.

The learned Judges of the High Court in deciding the case against the plaintiff relied entirely on the time factor. It is true that the parties could not contemplate an absolutely unlimited period of time to fulfil their contract. They might certainly have in mind a period of time which was reasonable having regard to the nature and magnitude of the work to be done as well as the conditions of war prevailing at that time. Das Gupta, J., who delivered the judgment of the High Court, says first of all that the company had in contemplation a period of time not *much* exceeding 2 or 3 years as the time for performance of the contract; the purchaser also had the same period of time in contemplation. The learned Judge records his finding on the point in the following words:

"My conclusion on a consideration of the surrounding circumstances of the contract is that the parties contemplated that the roads and drains would be constructed and the conveyance would be completed in the *not distant future.*"

This finding is inconclusive and goes contrary to what has been held by the District Judge who was undoubtedly the last court of facts. In our opinion, having regard to the nature and terms of the contract, the actual existence of war conditions at the time when it was entered into, the extent of the work involved in the development scheme and last though not the least, the total absence of any definite period of time agreed to by the parties within which the work was to be completed, it cannot be said that the requisition vitally affected the contract or made its performance impossible.

Mr. Gupta, who appeared for the respondent company put forward an alternative argument that even if the performance of the contract was not made impossible, it certainly became illegal as a result of the requisition order and consequently the contract became void under section 56 of the Indian Contract Act as soon as the requisition order was made. In support of his contention the learned counsel placed reliance upon certain provisions of the Defence of India Rules and also upon illustration (d) to section 56 of the Contract Act. All that the Defence Regulations show is that the violation of a requisition order could be punished as a criminal offence. But no matter in whichever way the requisition order could be enforced, in substance it did nothing else but impose a prohibition on the use of the land during the period that it remained in force. The effect of such prohibition on the performance of the contract, we have discussed above, and we do not think that the mere fact that the requisition order was capable of being enforced by a criminal sanction made any difference in this respect. In any view this question was not raised in any of the courts below and has not been indicated even in the respondents' statement of the case. We do not think that it would be proper to allow this question to be raised for the first time before us, as it requires consideration of the different provisions of the Defence of India Act and also of the implication of illustration (d) appended to section 56 of the Contract Act. In our opinion, the events which have happened here cannot be said to have made the performance of the contract impossible and the contract has not been frustrated at all. The result is that the appeal is allowed, the judgment and decree of the High Court of Calcutta are set aside and those of courts below restored. The plaintiff will have his costs in all the courts.

S. C. Banerjee: Agent for the Appellant.

R. R. Biswas: Agent for the Respondent No. 1.

S.C.P. *Appeal allowed with costs.*

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Before Mr. Justice P. N. Mookerjee.

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April, 28.

L. A. SAUNDERS *alias* SONDERS

v.

LAND CORPORATION OF BENGAL LTD.*

Ejectment Suit—Suit for ejectment after statutory notice to quit—Rent accepted after institution of suit and the suit dismissed for non-prosecution—A fresh notice and a fresh suit for ejectment—Whether dismissal of the earlier suit bars the latter suit.

Notice—Section 106 of the Transfer of Property Act—Purpose of occupation —"Residential and manufacturing purposes" a mixed and multiple purpose—Fifteen days' notice sufficient to determine such tenancy

Order 9 Rule 9 of the Civil Procedure Code bars a subsequent suit on the "same cause of action." Identity of the cause of action is the test and, unless that is established, the bar of this rule will not apply.

An earlier notice to quit would undoubtedly be an essential part of the cause of action of the earlier suit and in the same way a subsequent notice would be an essential part of the cause of action for a subsequent suit for ejectment. These two notices are obviously not the same and so the cause of action in the two suits would be different. The evidence for these two purposes would be different and the same evidence would not necessarily prove the two notices and/or their service. It must therefore be held that causes of action of the two suits are different and not the same and, accordingly, Order 9, Rule 9 of the Code of Civil Procedure cannot apply to bar the fresh suit

Section 106 of the Transfer of Property Act prescribes "six months' notice" in cases of tenancies for "manufacturing or agricultural purposes" and "fifteen days' notice" in all other cases. But "residential and manufacturing purposes" are not "manufacturing purposes" within the meaning of the above section and these "mixed and multiple" purposes would take it outside the earlier clause and bring it within the later residuary clause "for any other purpose."

Appeal by the Defendant tenant.

* Appeal from Appellate Decree No. 758 of 1953 against the decree of Sri C. C. Chakrabarti, Subordinate Judge, 1st Court of Zillah 24-Parganas, at Alipore in Title Appeal No. 284 of 1952 dated 31st of January, 1953 affirming the decree of Sri P. K. Chanda, Munsif 1st Additional Court Scaldah, dated the 15th March, 1952

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April, 28.

Suit for ejectment on grounds of building and rebuilding purposes.

The material facts will appear from the judgment.

Ajit Kumar Dutta and P. C. Ghosh for the Appellant.

A. C. Mukherjee and P. C. Basu for the Respondents.

The judgment of the Court was as follows:—

P. N. Mookerjee, J.:—In April, 1937, the appellant Mrs. L. A. Saunders entered into occupation of the disputed premises No. 8, Canal Street, Calcutta, as a tenant under the respondent's predecessor. There was no written document creating or evidencing the lease but the rental was Rs. 101/4/- per month and it was payable monthly according to the English calender.

On 15th September, 1944, the respondent Company (M/s. Land Corporation of Bengal Ltd.) purchased the suit premises and the appellant's tenancy continued under them. In December, 1949, the respondent company served upon the appellant a full 15 days' notice to quit requiring her to vacate the suit premises on the expiry of the said month and, on 6th February, 1950, the present suit was instituted for her eviction. In the plaint there was an allegation *inter alia* that the plaintiff company required the suit premises *bonafide* for building and rebuilding purposes. That was also the allegation in the notice to quit and the bar of the Rent Control law against eviction was sought to be avoided on that ground.

The suit was resisted on various pleas but, for my present purpose, it is necessary to mention only four defences, namely (i) that the suit was barred by reason of the dismissal of a previous suit for ejectment (ii) that the 15 days' notice to quit was illegal, invalid and insufficient as, under the law, a six months' notice was necessary to terminate the suit tenancy (iii) that the plaintiff's case of *bonafide* requirement for building and rebuilding purposes was untrue and (iv) that the suit tenancy was governed by the Calcutta Thika Tenancy Act and the defendant was protected by the said statute from eviction.

The learned Munsif overruled all the defences and decreed the plaintiff's suit. On appeal that decision was affirmed by the learned Subordinate Judge. Hence, the present Second Appeal by the tenant defendant.

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In support of the appeal, Mr. Dutta urged the four defences, to which a specific reference has been made above. The last two defences, however, may be disposed of without much discussion and, accordingly, for the sake of convenience, I take up the points in the reverse order.

The defendant's tenancy admittedly included a residential building in the suit premises which formed part of the property let out to her. Clearly, therefore, the Calcutta Thika Tenancy Act can have no application to this case which falls to be governed by the Rent Control Law. The defence under the Calcutta Thika Tenancy Act and the defendant's claim of protection thereunder must, therefore, be overruled.

The question of bonafide requirement also need not detain us long. Both the courts below have concurrently found that the plaintiff's case that they require the suit premises *bonafide* for building and rebuilding purposes has been sufficiently proved. On the materials before me I have little hesitation in accepting the said finding. The Bench decision of this Court in the case of *Bhulan Singh & ors.* v. *Ganendra Kumar Chowdhury* (1), lays down the guiding principles in such matters and those principles fully support the plaintiff's case.

I take up now the defence plea of bar, based on the dismissal of the previous suit. The relevant facts are not in dispute and they appear as follows:

In March 1949, the plaintiff served upon the defendant a notice to quit requiring her to vacate the suit premises on the expiry of that month. There also the plaintiff's allegation was that they (the Company) required the said premises for building and rebuilding purposes. The defendant, however, did not leave as required by the said notice and so a suit for ejectment was instituted. That suit was eventually dismissed for default on 21st November, 1949. Thereafter, the present notice to quit was served in December, 1949 terminating the defendant's tenancy with the end of that month and the present suit was brought on 6th February, 1950.

In this suit the plaintiff's allegation is that the earlier

(1) (1949) 54 C.W.N. 866.

suit for ejectment was allowed to be dismissed for default or non-prosecution as, after the previous notice to quit, rents had been accepted by them from the defendant and they felt that, as a consequence, the said notice had been waived.

On the above state of facts, the appellant contends that the present suit is barred under Order 23 Rule 1(3) and Order 9 Rule 9 of the Code of Civil Procedure. I ought to mention here that this latter provision was not mentioned either in the written statement or in the grounds of appeal to this court although reference was made to Order 23 Rule 1(3) of the Code. In the lower appellate Court this plea in bar was not pressed at all. The omission, however, of this plea before the lower appellate Court or on reference to Order 9 Rule 9 in the written statement or in the ground of appeal in this Court is not, in my opinion, fatal to this point of law when no new facts necessary for its consideration. I have, therefore, allowed Mr. Dutt full opportunity to argue this point but, to my mind, it is of little assistance to his client in the ultimate analysis.

It is quite obvious that Order 23 Rule 1(3) of the Code has obviously no manner of application to the facts, stated above. The earlier suit was not withdrawn but was dismissed may be, it was allowed to be dismissed for default or non-prosecution. It was clearly a dismissal under Order 9 Rule 8 of the Code and it is impossible to treat it as a withdrawal under Order 23 Rule 1(3). This is sufficient to reject the appellant's argument so far as it is based on Order 23 Rule 1(3) of the Code.

As to Order 9 Rule 9 of the Code, the position is a little different but the ultimate result is the same. That rule bars a subsequent suit on the "same cause of action." Identity of the cause of action is the test and, unless that is established, the bar of this rule will not apply. Judged by this test, the appellant's contention must fail.

The words "cause of action" in Order 9 Rule 9 of the Code refer "entirely to the ground set forth in the plaint as the cause of action or, in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour" vide *Mussummat Chand Kour* v. *Partab Singh & ors.* (1), which was a case under the corresponding Section 103 of the Old Code. The phrase "cause of action" has also been recently considered by the Judicial Committee in

(1) (1888) L.R. 15 I.A. 156.

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relation to another provision, viz. Order 2 Rule 2 of the Code where also it occurs and their lordships have adopted the meaning "(principle)" set out above, for the purpose of the said rule too, vide *Mohammad Khalil Khan & ors.* v. *Mahbub Ali Mia & ors.* (1). The classic judicial definition of the phrase as meaning "every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment" and as including "every fact which it would be necessary to prove if traversed in order to enable the plaintiff to maintain his action" in the leading English case of *Cooke* v. *Gill* (2), and *Read* v. *Brown* (3), was accepted as the guide and various decisions of the Board were considered and examined in the light thereof. It is worth noting that the decisions so considered included cases under Order 2 Rule 2 and Order 9 Rule 9 of the Code of 1908 and/or the corresponding section or sections of the old Code or Codes and the discussion was quite general and was not confined to any particular provision. It is true that in *Mohammad Khalil's case* (1), their Lordships referred to *Mossamat Chand Kour's case* (4), as a case under section 43 of the Act of 1882 corresponding to Order 2 Rule 2 of the present Code, although it was a case under Section 103 of the old Act corresponding to the present Order 9 Rule 9, but that was an obvious slip and did not in any way affect or detract from the generality of the meaning of the phrase "cause of action" as laid down by their Lordships. It seems to me that this decision of the Judicial Committee is sufficient authority for the view that the phrase "the same cause of action" has the same meaning in either of the said two provisions. The cause of action must, of course, be "the cause of action which gives occasion for and forms the foundation of the suit" but includes the whole of that right and its infringement, in the light of the allegations in the plaint. The same cause of action would obviously imply identity of the cause of action the right and its infringement as a whole and, although in considering this question, the Courts will look to the substance of the matter any difference as to any essential part would be fatal to the proof of this identity. On this question of identity of the cause of action or "the same cause of action" a

(1) (1948) L.R. 75 I.A. 121 (143-4); [1949] A.I.R. (P.C.) 78 (86).
(2) (1873) L.R. 8 C.P. 107.
(3) (1888) 22 Q.B.D 128.
(4) (1888) L. R. 15 I.A. 156.

useful and convenient test not necessarily conclusive but certainly workable—was also laid down by their Lordships, viz. whether the same evidence would support the claim in both the suits.

Tested by the above "principles" the appellant's plea of bar under Order 9 Rule 9 of the Code must inevitably fail. The March notice to quit would undoubtedly be an essential part of the cause of action of the earlier ejectment suit and in the same way the "December" notice would be an essential part of the cause of action for the later, that is the present, suit for ejectment. These two notices are obviously not the same and so the cause of action in the two suits would be different. Clearly also the same evidence would not have supported the plaintiff's case in the two suits. To succeed in the earlier suit, the plaintiff had certainly to lead evidence to prove the sufficiency and validity of the March notice and due service thereof. To succeed in the present suit, he has to establish those elements in regard to the December notice. The evidence for these two purposes would plainly be different and the same evidence would not necessarily prove the two notices and or their service. I, hold, therefore, that causes of action of the two suits are different and not the same and, accordingly, Order 9 Rule 9 of the Code cannot apply to bar the present suit.

The matter may also be looked at from a slightly different point of view. The December notice to quit on its express terms vide the words "I hereby give you notice to quit on its express terms (vide the words," hereby give you notice to quit and vacate on expiry of the month of December 1949 the undermentioned property which you hold under my client aforesaid as a monthly tenant at will" occurring in the said notice) was a clear recognition of the continuance of the defendant's tenancy upto December 1949. This tenancy had to be terminated before the present suit for ejectment could be filed; otherwise, there would be no cause of action for this suit. This termination was effected by the "December" notice to quit which completed—though it may not have wholly constituted the cause of action for the present suit. Essentially, therefore, it is a new cause of action to which Order 9 Rule 9 of the Code can have no possible application.

In the above view of the matter I reject the appellant's argument, based on Order 23 Rule 1(3) and Order 9 Rule 9

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of the Code of Civil Procedure.

The sufficiency and validity of the notice to quit now remains to be examined. There is no dispute that a full 15 days' notice to quit was properly served but the point has been raised that a "six months" notice "was necessary to determine the defendant's tenancy. This argument is based on section 106 the Transfer of Property Act which prescribes "six months' notice" in cases of tenancies for "manufacturing or agricultural purposes" and "fifteen days' notice" in all other cases. The appellant contends that the tenancy in suit was for "manufacturing purposes" within the meaning of the said section. The respondent, on the other hand, seeks to bring it within the words "a lease of immoveable property for any other purpose" as used in the statute.

In the written statement the allegation was that the suit tenancy was taken for "residential and workshop purposes." That was repeated in the appellant's evidence which has been accepted by the two Courts below. The term "workshop purposes" has been elaborated by the appellant in her evidence as meaning "purposes of her electroplating business" which, according to her, included also plating of new articles. All this may be accepted but, even then, in my opinion, the appellant cannot succeed.

Conceding that "electroplating" would be "manufacture" for the purpose of section 106 of the Transfer of Property Act, the appellant's tenancy would, on her own case and evidence be for "residential and manufacturing purposes" as distinguished from "manufacturing purposes" and these "mixed and multiple purposes" would take it outside the earlier clause and bring it within the later residuary clause "for any other purpose." That is the effect of the decision of this Court in the case of *Sati Prasanna Mukherjee & ors.* v. *Md. Fazal* (1), which was affirmed on appeal by the appellate Bench in *Muhammad Fazal* v. *Sati Prasanna Mukherjee and others* (2), where Banerjee, J. delivering the judgment of the Court, observed *inter alia* that "where it cannot be said that the purpose of the lease was solely either for agricultural or manufacturing purpose, it would come within the second category,

(1) (1950) 86 C.L.J. 12.

(2) Original Side Appeal from Original Decree No. 52 of 1950, decided by Chief Justice Harries and Mr. Justice Banerjee on 28-11-50.

viz. "a lease for any other purposes." This Bench decision is binding upon me, sitting singly, and, upon its authority, I must overrule the appellant's contention.

To get over this difficulty Mr. Dutt sought to reply on the theory of primary purpose and he pointed out that, although the appellant's tenancy was *prima facie* for "residential and manufacturing purposes," it was primarily for "manufacturing purposes" and hence, for the purpose of section 106 of the Transfer of Property Act, it must be held to have been for "manufacturing purposes." On this argument, it is enough to say that no such case was made either in pleading or at the trial and there is not the slightest evidence nor a suggestion even in the papers before me in support of Mr. Dutt's contention. I accordingly, reject also this plea of the appellant.

I have discussed above all the points, urged in support of the appeal, and, in my view, none of them can be accepted This appeal, must, therefore, fail and it has to be dismissed although, in the circumstances of this case, I feel that such dismissal should be made subject to the granting of some time to the appellant to vacate the suit premises. The appellant has undoubtedly spent a fairly large amount for her electroplating business which is carried on in the said premises. She has also erected certain sheds and installed heavy machineries at considerable cost. The result of this litigation was uncertain, the rights of the parties, involved in the issues in the present suit, were not very clear. In such circumstances, it is only proper that the appellant should have sufficient time to remove her said business shed and machineries from the disputed premises. At the same time, however it must be borne in mind that the respondent company requires the suit premises *bonafide* for "building and rebuilding." Taking everything into consideration, I am inclined to grant the defendant four months time to vacate the suit premises.

I accordingly, dismiss this appeal subject to this that the defendant appellant will have time till the end of August, 1954 to vacate the suit premises and during this period the respondent company will not be entitled to execute this decree for ejectment.

I further direct that the parties will bear their own costs in this Court.

S.C.P. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee.

CIVIL.

1954.

March, 11.

BASANTA KUMAR SEN
v.
GOUR HARI DEY.*

Transfer of Property Act—Second part of Section 44—Tank and garden, whether can be deemed to be a part of the "dwelling house"—After partition, integrity of family residence broken and the tank and garden no longer remain a part of the "dwelling house"—Stranger-purchaser's right of use and possession.

A "house" or a "dwelling house" may mean a building or a hut or even something which is substantially useable for human residence. But a garden or open land and/or a tank cannot by themselves, that is apart from or independently of any hut or structure, reasonably constitute a "house" or a "dwelling house." They or any of them along with a "house" or a "dwelling house" proper taking these terms in their widest possible connotation, may come within that description but once they are dissociated from this last quoted physical component, they do not retain their original character and, considered separately or apart from the "house" or "dwelling house" proper, they are no longer a "dwelling house" either on theory of convenience or physical affinity or appurtenance or on theory of physical integrity or parts or components. There the affinity or integrity is so completely broken that their legal character utterly changes and their legal incidents become materially different.

Appeal by the Plaintiffs.

Suit under Section 44 of the Transfer of the Property Act for a permanent injunction to restrain the defendants from taking possession of a certain share in the garden and a tank.

The material facts will appear from the judgment.

Hari Prasanna Mukherjee and P. K. Chatterjee for the Appellants.

Lala Hemanta Kumar and S. K. Banerjee for the Respondents.

* Appeal from Appellate Decree No 254 of 1949 against the decree of Sri N Chowdhury, Sub-Judge of Zillah Birbhum at Suri in Title Appeal No. 170 of 1947 dated the 13th of December 1948 affirming the decree of Sri R. Biswas, Munsif of Dubrajpur, dated the 6th of October, 1947.

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March, 11.

The judgment of the Court was as follows:—

P. N. Mookerjee, J.:—This appeal raises an interesting question under the second part of section 44 of the Transfer of Property Act.

The following facts are no longer in dispute:

One Jaga Mohan Sen was the owner of a fairly big dwelling house (now recorded in C.S. Dags Nos. 1195 and 1054) to which appertained the disputed garden (C.S. Dag No. 1052) and tank (C.S. Dag No. 1053), Jaga Mohan left two sons, Brojendra and Chandra Bhusan who acquired, on his death, all his properties by inheritance. In course of time the joint properties, so obtained by the said two brothers Brojendra and Chandra Bhusan, were partitioned through Court and that partition, so far as it is relevant for our purpose, exclusively allotted the building in C.S. Dag No. 1195 to Brojendra and made a similar allotment in favour of Chandra Bhusan in respect of the house in C.S. Plot No. 1054, and the tank and the garden (C.S. Plots Nos. 1033 and 1052) were kept joint between the two brothers with a declaration of title to the extent of a moity share in favour of each brother subject *inter alia* to certain reservations, namely, that "Brojendra will use the old pucca ghat of the tank while Chandra Bhusan will make a new ghat for going to the tank and that Brojendra shall not go to the tank through the house of Chandra Bhusan." Brojendra and Chandra Bhusan are both dead. The plaintiff is the son of Chandra Bhusan and the proforma defendants represent Brojendra's branch of whom the principal defendants' vendor Padma Sundari is the widow of Durgapada who was one of Brojendra's four sons. Admittedly, Padma Sundari got by inheritance through her deceased husband a two-annas share of the disputed tank and garden and admittedly also she sold this two-annas share to the contesting defendants Nos. 1 to 3 by a kobala dated 2nd Chaitra, 1353 B.S. corresponding to 16th March, 1947. As these strangers purchasers were making preparation for taking possession of the said two annas share of the disputed tank and garden, the plaintiff brought the present suit "under section 44 of the Transfer of Property Act" for a permanent injunction to restrain them from so doing.

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The suit was contested by the purchasers defendants and their main defence was (i) that section 44 of the Transfer of Property Act was available only as a defence and no suit could be brought to restrain the stranger purchasers and that, accordingly, the present suit was not maintainable in law and (ii) that, in any event, the disputed properties, viz. the tank and the garden were not within the mischief of the section as they could not be held to be "dwelling house" within the meaning of that section.

The first defence was overruled by the learned Munsif and it was not pressed thereafter, I may note, however, that on this question of maintainability of the suit, the opinion in this Court is not uniform [vide *Lal Behari Samanta & ors.* v. *Gourhari Dawn* (1), and *Jogendra Nath Mondal & ors.* v. *Adhar Chandra Mondal* (2)]. For my present purpose, it is unnecessary to pursue this matter further as, in my opinion, the plaintiff's suit fails on the merits. I accordingly reserve my opinion on this important though technical, question of law.

The second defence, however, succeeded in both the Courts below and the plaintiff's suit was dismissed. Accordingly, the plaintiff has preferred this second Appeal.

The Courts below have held that, on the facts, stated above the disputed tank and garden cannot constitute a "dwelling house"—or part of a "dwelling house"—belonging to an undivided family and that, accordingly, the suit cannot succeed. According to the learned Munsif, "the family is divided" and "the dwelling houses are divided" and "the plaintiff and the proforma defendants are not members of an undivided family, nor do they live in one dwelling house, but in separate and distinct dwelling houses." These findings have been generally accepted by the learned Subordinate Judge, the material portion of whose judgment is as follows:—

> "Undoubtedly before the partition the tank and the garden could be deemed as part of the dwelling house of Brojendra Sen and Chandra Sen. But by the partition

(1) (1950) 54 C.W.N. 912.
(2) (1950) 55 C.W.N. 289.

decree, the integrity of the family residence has been broken and the family has been divided *qua* the dwelling house. Accordingly I hold that the tank and the garden have lost their character as part of the old dwelling house."

It has been argued before me by the learned Advocate for the appellant that Courts below have placed too narrow a construction on the expression "dwelling house," as used in section 44 of the Transfer of Property Act or as understood in the relevant Hindu Law, and he has argued, in substance, that once a 'dwelling house' always a 'dwelling house'—no matter that the 'dwelling house' strictly or properly is called, to which the disputed property, not itself comprising any structure once appertained, has been partitioned and has ceased to be a joint property or has even ceased to exist. In dealing with this argument, I must make it clear that I am concerned in this Appeal only with the rights of the plaintiff—appellant as against the defendants respondents and I shall be making no pronouncement on the rights of the proforma defendants as against the principal defendants which do not arise for consideration in these proceedings and for which naturally the necessary materials are not before me. Nothing in this judgment will affect the legal rights, if any, of the proforma defendants as against the principal defendants.

On the question of the plaintiff's rights, I am unable to hold that the Courts below have gone wrong and, accordingly, I feel bound to affirm their decision.

Broadly speaking, so far as the plaintiff is concerned, the true legal position has been correctly summed up and set out in the extract, quoted above from the judgment of the learned Subordinate Judge. The plaintiff's claim has been very fully and fairly dealt with by the two courts below and I have little doubt that the substance of this decision is wholly in accord with the relevant principles of law.

There is no disputed tank and the garden lay contiguous to the common ancestral dwelling residence or dwelling house proper of the Sen family. There is also no dispute that along with the said common ancestral residence, the disputed tank and garden constituted the "dwelling house" of the undivided

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family of the Sens as appurtenances of the said common residence or as parts thereof whether on the theory of convenient enjoyment or on the theory of physical integrity, that is as components of the same physical unit. The partition, however, brought about a vital change. The actual dwelling house or the dwelling house proper—and, indeed, all the structures,—were divided between the two branches of the Sen family,—the plaintiff and the proforma defendants,—by metes and bounds and nothing that remained joint or undivided could even remotely be called a house or a dwelling house. The disputed tank and garden were no doubt kept joint between the parties, but neither of them by itself, that is, independently, or along with the other, would be a house—not to speak of a dwelling house—even in the widest possible sense of that term. A "house" or a "dwelling house" may mean a building or a hut or even something which is substantially useable for human residence—Vide *Boto Krishna Ghose* v. *Akshoy Kumar* (1), vide also *Dulal Chandra Chatterjee* v. *Gosthabehari Mitra* (2), but a garden or open land and or a tank cannot by themselves that is, apart from or independently of any hut or structure, reasonably constitute a "house" or a "dwelling house." They or either of them along with a "house" or a "dwelling house" proper taking these terms in their widest possible connotation, as indicated above, may no doubt come within that description but once they are dissociated from this last quoted physical component, they do not retain their original character and, considered separately or apart from the "house" or "dwelling house" proper, they are no longer a "dwelling house" either on the theory of convenience or physical affinity or appurtenance or on the theory of physical integrity or parts or components. There the affinity or integrity is so completely broken that their legal character utterly changes and their legal incidents become materially different. *A fortiori* also if there is no dwelling house, the question of the dwelling house of an undivided family does not arise. True, the undivided character of the family will have to be judged *qua* the dwelling house—vide *Boto Krishna Ghose* v. *Akshoy Kumar Ghosh and others* (1), but in the absence of this latter element, namely, the dwelling house, that enquiry becomes wholly redundant or irrelevant.

(1) (1946) 50 C.W.N. 450, on appeal (1949) 54 C.W.N. 660.
(2) (1952) 56 C.W.N. 681.

In course of argument, Mr. Mukherjee drew my attention particularly to the decision of the Patna High Court in the case of *Sheodhar Prasad Singh & ors.* v. *Kishun Prasad Singh & ors.* (1). That case which appears to be rather an extreme one may, possibly, at first sight, and *prima facie,* lend some apparent support to the appellants contention, but I am unable to accept it as any real authority in the plaintiffs favour. There was at least a Siroghar there to bring the entire disputed property within the possible range of the wider connotation of "dwelling house" and the decision may be justified on that ground. I find also some reference in that judgment to "portions of house left" (Vide p. 5(2) of the Report) which apparently indicates the existence of other structures. I do not think, therefore, that the case cited really touches the question, now before me, or materially aids the appellant.

Mr. Mukherjee also cited the cases of *Nil Kamal Bhattacharjee and anr.* v. *Kamakshya Chandra Bhattacharjee and ors.* (2), *Latifannessa Bibi* v. *Abdul Rahaman* (3), *Boto Krishna Ghose* v. *Akshoy Kumar Ghose* (4), and *Sumitra* v. *Dhannu* (5). But in all these cases, there was admittedly a "dwelling house" proper, and the disputed properties were held to appertain to the same and thus to come within the term "dwelling house," as used in section 44 of the Transfer of Property Act or in section 4 of the Partition Act. None of the cases cited is therefore, any authority in the appellant's favour.

I am not also impressed by Mr. Mukherjee's argument based on the spirit of the relevant statutory provision, namely, section 44 of the Transfer of Property Act. To hold that the disputed tank and or garden constitute a "dwelling house" would be imagining things which even the boldest legal fiction would not permit. I am not prepared to carry the spirit of the section to that extreme and I have little hesitation in rejecting Mr. Mukherjee's argument.

(1) [1941] A.I.R. Pat. 4.
(2) [1928] A.I.R. Calc. 539.
(3) [1934] A.I.R. Calc. 202.
(4) (1949) 54 C.W.N. 660.
(5) [1949] I L.R. Nag. 379

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I ought to mention also that, although during discussion, Mr. Mukherjee threw out a broad hint that it was just possible that there was some rule or principle of Hindu Law which would support his client's claim, his optimism remained unrewarded and his search proved unavailing and failed to discover anything which would be of the least service to his client. The contention of the appellant is of an extreme character. It receives no support from the written or the unwritten law of the land and there is nothing behind it in the shape of authority or precedent. It has also little merit in the facts and circumstances of this case. In this state of things, I am reluctant to accept it or to give effec to it in any shape of form.

In the above view of the matter, which seems to me to be the only proper view of the relevant law on the subject and which, I am respectfully add, receives also considerable support from the observations of this Court in the latest Bench decision in *Dulal Chandra Chatterjee* v. *Gosthabehari Mitra* (1), cited above, I am inclined to hold that the second part of section 44 of the Transfer of Property Act is of no assistance to the plaintiff and, accordingly, his suit must be held to have been rightly dismissed by the two courts below.

The appeal, therefore, fails and it is dismissed, but in the circumstances of this case, I direct that the parties will bear their own costs in theis Court.

Leave to appeal under clause 15 of the Letters Patent is asked for and it is refused.

S.G.P. *Appeal dismissed.*

(1) (1952) 56 C.W.N. 681.

CIVIL REVISION.

Before Mr. Justice B. K. Guha.

CIVIL.

1954.

May, 21.

SUDHAMAY BASU

v.

RAJA RAM RAMSAMAJ SINGH.*

Code of Civil Procedure—Order 21, Rules 98 and 99—Execution of ejectment decree resisted by stranger—Stranger's claim of sub-tenancy negatived by Court—Whether the stranger may still be a "person claiming in good faith to be in possession on their own account"—Order 21, Rule 99 of the C.P.C.

Where the execution of an ejectment decree was resisted by a stranger to the suit, and the decree-holder filed an application for relief under Order 21, Rule 97 of the Code of Civil Procedure:

And where it was found that the stranger's claim of sub-tenancy was not maintainable but at the same time the stranger appeared to have been in possession since before the institution of the suit and carrying on business at the site:

Held: That although the person offering resistance may not be held to be a sub-tenant, yet he is also not a person offering resistance on behalf of or at the instigation of the judgment-debtor. Moreover, his being in possession of and carrying on business at the premises clearly suggest that he is a person claiming in good faith to be in possession on his own account, and thus he should be permitted to defeat the claim of the decree-holder for relief under Order 21, Rule 99 of the Civil Procedure Code.

Application by Decree-holder under Order 21, Rule 97.

Resistance by the Respondent to the execution of the Decree.

The material facts will appear from the judgment.

Mihir Kumar Sarkar for the Petitioner.

Manindra Nath Ghosh and Anil Kumar Seth for the Respondent.

The judgment of the Court was as follows:

* Civil Revision Case No. 3269 of 1953, against the order dated 1-9-53 of the 6th Bench, Court of Small Causes, Calcutta in Suit No. 789 of 1953.

CIVIL.

1954

Sudhamay Basu
v.
Raja Ram Ramasamaj Singh

May, 21.

B. K. Guha, J.:—This is an application under section 115 of the Code of Civil Procedure by the plaintiff petitioner against an order passed by a Small Cause Court Judge on 1st September, 1953, rejecting his application under Order 21, Rule 97 of the Code of Civil Procedure. The subject matter of the dispute is a shop room at 201B, Harrison Road. The present petitioner obtained a decree for ejectment against a firm styled Messrs. Raja Ram Ramsamaj Singh and when the decree was sought to be executed, there was resistance by opposite party No. 2 Messrs. Prokash Stores. Thereupon, the decree-holder filed an application under Order 21, Rule 97 of the Code of Civil Procedure alleging that the obstruction was occasioned by the judgment-debtor. On the same day another application was filed by Prokash Stores under Order 21, Rule 100, alleging that they were sub-tenants under the judgment-debtors. The application preferred by Messrs. Prokash Stores under Order 21, Rule 100 of the Code of Civil Procedure has been rejected on the ground that it is not maintainable as there is no allegation that Messrs. Prokash Stores have been dispossessed. In so far as the application presented by the decree-holder, namely the present petitioner, under Order 21, Rule 97 is concerned, the learned Judge has come to the conclusion that the decree-holder is not entitled to the benefit of Rule 98 of Order 21, inasmuch as the resistance in question was not occasioned by the judgment-debtor or by some other person at his instigation or on his behalf. As regards the finding of the learned Judge that the decree-holder cannot get any relief under Order 21, Rule 98 of the Civil Procedure, no serious challenge has been directed by the learned Advocate for the petitioner. What, however, he contends strongly is that the Court should have given him relief under Order 21, Rule 99 of the Code of Civil Procedure. He argued that the resistance offered by Messrs. Prokash Stores cannot be said to be resistance occasioned by a person claiming in good faith to have a right to be in possession of the property on their own account or on account of some person other than the judgment debtors and, accordingly, the decree-holder is entitled to the benefit of Rule 99. In this connection he has referred me to several cases. One of these cases is the case of *Ramaswami Nadar* v. *Shanmugha Malavarayan* (1), in which relying upon two Bombay cases [*Jafferji* v. *Miyadin* (2), and

(1) [1928] A I.R. Mad 909. (2) [1922] A I.R. Bom 273

Jairam Gadowji v. *Nowroji Jamshedji* (1)], it was held that "Order 21, Rule 99 by its wording implies that when the Court is not satisfied that the resistance or obstruction was occasioned by a person claiming in good faith to be in possession of the property on his own account i.e., if it is not satisfied, e.g. with the claimant's good faith, or that he is in possession on his own account, the Court shall allow the application." I would concede that this construction of Order 21, Rule 99 is correct.

The next point for consideration is whether Messrs. Prokash Stores can be said to be persons (other than the judgment-debtors) claiming in good faith to have a right to be in possession of the property on their own account or on account of some person other than the pudgment-debtors. In the view of the learned Judge," the evidence regarding a valid sub-tenancy in favour of Messrs. Prokash Stores by the firm Messrs. Raja Ram Ramsamaj Singh is not very satisfactory. But nevertheless the fact remains that the room in question was in possession of Prokash Stores for some time past." The The Municipal Trade Licence would show that it (i.e. Messrs. Prokash Stores) was in existence from December, 1952, that is, since before the filing of the ejectment suit. It has been further found that the sub-tenancy was not created by the judgment-debtors nor again did the superior landlords recognise it. According to the case of Messrs. Prokash Stores, the sub-tenancy was granted by one Nandalal Singh who according to them was a partner of the judgment-debtor firm. But this story about Nandalal being a partner does not appear to have been accepted by the lower court and the alleged sub-tenancy said to have been granted by Nandalal Singh has not been held to be valid. According to the case of the judgment-debtors Nandalal was simply an employee of theirs and not a partner and this case seems to have found favour with the Judge.

The question now is whether in the above circumstances Messrs. Prokash Stores can be permitted to defeat the claim of the decree holders for relief under Order 21, Rule 99. In my opinion the answer should be in the affirmative. The real question is whether Messrs. Prokash Stores can be said to be persons

(1) [1922] A.I.R Bom. 449.

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B. K. Guha, J.

claiming in good faith to be in possession on their own account. They were in possession since before the institution of the ejectment suit. In the plaint also of that suit there is mention of transfer of the tenancy by the defendants, namely, Messrs. Raja Ram Ramsamaj Singh though the name of Messrs. Prokash Stores was not mentioned. Even if Messrs. Prokash Stores be held to be trespassers, they can well claim to be in possession on their own account. They were not impleaded in the ejectment suit [see in this connection *Narayan Bera* v. *Jharu Mandal of Baratola* (1)]. The case of *Sew Sankar Lal* v. *Bejoy Krishna Dutta* (2), is no direct authority for the proposition contended for on behalf of the petitioner; it deals with a converse case. The case of *Radhika Mohan Shaha* v. *Gyan Chandra Shaha* (3), is again of no assistance to the petitioner. Messrs. Prokash Stores are in possession and their bonafide claim does not entitle the decree holder to relief under Order 21, Rule 99 and, therefore, no question of equitable relief can arise.

In these circumstances, therefore, I am of opinion that neither under Order 21, Rule 98, nor under Rule 99 is the decree-holder entitled to the relief prayed for by him.

The Rule must accordingly be discharged. But in the circumstances no order is made as to costs.

S.G.P. *Rule discharged.*

(1) [1928] A.I.R Calc. 792.

(2) (1952) 57 C.W.N. 65.

(3) (1910) 6 I C. 120.

ORIGINAL CIVIL.

Before Mr. Justice R. S. Bachawat.

CIVIL.

1953.

July, 20.

NALINI RANJAN GUHA

v.

UNION OF INDIA.*

Indian Contract Act, Sections 65 and 70—What should be pleaded and proved.—Notice under Section 80 of Civil Procedure Code—What constitutes part of cause of action.

A claim under section 65 of the Indian Contract Act involves mixed questions of law and fact To substantiate a claim under that section the plaintiff has to allege and prove that (a) there was an agreement (b) the agreement is discovered to be void (c) an advantage was received after such discovery. A claim under the section must be specially pleaded

The antecedent request pursuent to which the work was done forms no part of the cause of action under section 70 of the Indian Contract Act.

Where notice is a part of the cause of action, such part of the cause of action arises at the place where the notice is served

Section 80 of the Code of Civil Procedure requires service of a notice in writing upon the defendant. The antecedent issue and posting of the notice are pieces of evidence necessary for proving the service of the notice but they are no part of the cause of action The cause of action arises in part at the place where the notice is served and not at the place where it is issued and posted.

Suit by a Contractor for recovery of Rs. 75,227/1.

The material facts will appear from the judgment.

R Choudhuri and S. K. Dutta for the Plaintiff.

G. P. Kar for the Defendant.

The judgment of the Court was as follows:—

R. S. Bachawat, J.:—This is a suit by a contractor against the Union of India for the recovery of the sum of Rs. 75,227/-.

* Original Side Suit No. 4307 of 1950.

CIVIL.

1953.

Nalini Ranjan Guha
v.
Union of India

Bachawat, J.

Under a contract in writing the plaintiff agreed to execute for the Governor General in Council the work of construction of labour hutments for 1500 labourers at Gonodih under the Asansol Aviation Division. In course of construction the plaintiff did various additional work. A part of the additional work was within the main contract. The claim for this part of the additional work has been stayed by an order of this Court under Section 34 of the Indian Contract Act. The rest of the additional work was beyond and distinct from the main contract. The claim for this part of the additional work has not been stayed and is the subject matter of this trial.

Allegations of fraud and misrepresentation made in paragraphs 11 and 12 of the plaint have been abandoned. The following issues were raised:

1. What additional work beyond and distinct from the main contract was done by the plaintiff? Are the particulars of such work given in Annexure 'A' to the plaint correct?

2. What is the reasonable compensation for the said work?

3. Did the plaintiff not intend to do the said work gratuitiously? Did the defendant obtain and enjoy the benefit or advantage thereof? Is the defendant bound to make compensation to the plaintiff therefor?

4. Is the suit not maintainable in view of the provisions of section 175 of the Government of India Act?

5. Has this Court jurisdiction to try this suit?

6. Is the suit barred by the law of limitation?

7. Is the notice dated 25th August 1950 a sufficient and valid notice under section 80 of the Code of Civil Procedure?

8. Does the plaint disclose any cause of action?

9. To what relief if any?

Issues Nos. 3, 4, 5, 6, 7, 8 and 9 only are being tried now. It is agreed that if the defendant succeeds on these issues, issues Nos. 1 and 2 will be referred for enquiry.

It is admitted by the defendant that instructions for the work was given by the defendant and its duly accredited servants or agents in Calcutta within the jurisdiction of this Court. It is also admitted by the defendant that the plaintiff did not intend to do the additional work gratuitously. It is also admitted that the defendant obtained and enjoyed the benefits and/or the advantages of the work.

The entire work was done outside the jurisdiction of this Court. Notice under section 80 of the Code of Civil Procedure was issued and posted at Calcutta and was served at Delhi outside the jurisdiction of this court.

The plaintiff, cannot base his claim for the additional work upon a contract as there is no contract in accordance with the provision of section 175 of the Government of India Act.

The plaintiff seeks to substantiate his claim under section 65 of the Indian Contract Act alternatively under section 70 of the said Act.

A claim under section 65 of the Indian Contract Act involves mixed questions of law and fact. To substantiate a claim under that section the plaintiff has to allege and prove that (a) there was an agreement (b) the agreement is discovered to be void (c) an advantage was received after such discovery. A claim under the section must be specially pleaded. The essential facts constituting the cause of action under that section has not been pleaded in this case. I decline to entertain a claim under that section in the absence of such pleading for reasons given by Sarkar, J. in *Messrs. Sidli & Co.* v. *The Governor General in Council* (1).

The plaintiff alternatively bases his claim under section 70 of the Indian Contract Act. I consider that the notice dated

(1) Suit No 1704 of 1946

CIVIL.

1953.

Nalini Ranjan Guha v. Union of India

Bachawat, J.

August 25, 1950, is a sufficient notice under section 80 of the Code of Civil Procedure for the purpose of a claim under that section. It is conceded that the claim is not barred by the law of limitation. It is conceded, and, in my view, rightly that the claim is governed by Article 120 of the Indian Limitation Act and that the work was done within 6 years from the date of the institution of the suit.

In order to succeed in a claim under section 70 of the Indian Contract Act the plaintiff must prove (a) that he did work for the defendant lawfully not intending to do it gratuitously and (b) that the defendant enjoyed the benefit of the work. Admittedly the work was done and the benefit was enjoyed outside the jurisdiction of this Court.

It is contended that as the work was done pursuant to request made at Calcutta part of the cause of action arose in Calcutta. In my view, the request is no part of the cause of action under section 70 of the Indian Contract Act. Assuming that a claim under that section can be made where there is express request to do the work such request is a mere piece of evidence to show that the work was done lawfully. In *Messrs. Associated Livestock Firm (India) Ltd.* v. *Dominion of India* (1), Sarkar, J. held that an antecedent void contract under which the work is done forms no part of the cause of action under section 70 of the Indian Contract Act. With respect I agree with this decision. In my view, the antecedent request pursuant to which the work was done forms no part of the cause of action under section 70 of the Indian Contract Act.

It is next contended that the issue and the posting of the notice at Calcutta forms part of the cause of action and that accordingly this Court has jurisdiction. This argument requires careful scrutiny.

The classic definition of the phrase "cause of action" is given in *Read* v. *Brown* (2), where Lord Esher M. R. observed. "What is the real meaning of the phrase 'a cause of action arising in the City'? It has been defined in *Cooke* v. *Gill* (3), to be this: every fact which it would be necessary for the plain-

(1) Suit No. 1040 of 1946.
(2) (1888) 22 Q.B.D. 128.
(3) (1873) L.R. 8 C.P. 107.

tiff to prove, if traversed, in order to support his right to the judgment of Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved."

I have held in *Raj Kumar Shaw* v. *Dominion of India* (1), *Dominion of India* v. *Jagadish Prosad Pannalal* (2), and the decision of Sinha J. in *Dunlop Rubber Co. (India) Ltd.* v. *Governor General in Council* (3), that notice under section 80 of the Code of Civil Procedure forms part of the cause of action.

Where notice is a part of the cause of action such part of the cause of action arises at the place where the notice is served. *Huth* v. *Long* (4), *Bimal Singh Kothari* v. *Muir Mills Co., Ltd.* (5).

In both Raj *Kumar Shaw* v. *Dominion of India* (1), and *Dominion of India* v. *Jagadish Prosad Pannalal* (2), the notice under section 80 of the Code of Civil Procedure was served within the jurisdiction of this Court.

In *Dunlop Rubber Co. (India) Ltd.* v. *Governor General in Council* (3), S. B. Sinha, J. appears to have held also that part of the cause of action arises also at the place where the notice is issued. With very great respect I am unable to agree with this part of his decision.

S. B. Sinha, J. relied upon *Engineering Supplies Ltd.* v. *Dhandhania & Co.* (6). That case decided firstly, that in a suit upon a contract the offer forms part of the cause of action. This no doubt is settled law. Thus, if an offer is given by A to a traveller of B at a place X, part of the cause of action in a suit for breach of the contract undoubtedly arises at place X. *Borthwick* v. *Walton* (7), *Green* v. *Beach* (8), and *Dhanmal Marwari* v. *Janakidas Baijnath* (9).

(1) (1952) 90 C.L.J. 295.
(2) (1948) 84 C.L.J. 175.
(3) Suit No. 1679 of 1946.
(4) (1850) 19 L.J.Q.B. 325.
(5) (1952) 56 C.W.N. 361.
(6) (1930) I.L.R. 58 Calc 539.
(7) (1855) 15 Q.B. 501.
(8) (1873) L.R. 8 Ex. 208.
(9) (1944) 49 C.W.N. 123 (125-6).

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The case of *Engineering Supplies Ltd.* v. *Dhandhania & Co.* (1), decided secondly that part of the cause of action arises at the place where the offer is posted. Since that decision our Court has consistently held that where the contract is concluded by correspondence through post between parties residing at different places part of the cause of action arises at the place where the offer is posted. *Katherine Stifles* v. *Carr Mackertich Martin* (2), *Brindarani* v. *Co-operative Assurance Co., Ltd.* (3).

The decision in *Engineering Supplies Ltd.* v. *Dhandhania* (1), professes to be founded upon English law and the decisions of the English Courts. The English Courts have uniformly and consistently held that no part of the cause of action in a suit upon a contract arises at the place where the offer is posted *Rabbits* v. *Cox* (4), *Newcombe* v. *De Roos* (5), *Cowan* v. *O'Connor* (6), *Clarke Bros.* v. *Knowles* (7).

In *Clarke Bros.* v. *Knowles* (7), Lawrence J. observed "I agree that the posting of the offer was no part of the cause of action. The making of an offer is part of the cause of action, but an offer is made where it is received, and that in this case was at Croydon." Lush J., at 133 observed "The material question is not where the offer was sent from but where it was made, and the making of the offer is proved by showing that it was received. Therefore, the offer was made in Croydon. A posting of it was no part of the cause of action."

In *Cowan* v. *O'Connor* (6), Hawkins J. observed "I think that where, as here, a person opens a correspondence and initiates a transaction by telegram he must be treated as though he were, through it, speaking to the person to whom such telegram is directed, at the place to which he directs it to be sent, and where he intends it to be delivered. * * * The authority to transmit the message, when established, is merely evidence which goes to fix the sender with the responsibility of sending it; but it is no part of the cause of action."

(1) (1930) I L.R. 58 Calc. 539.
(2) (1934) 39 C.W.N. 175.
(3) [1944] I.L.R. 1 Calc. 101.
(4) (1876) 35 L.T. 834.
(5) 29 L.J. Q.B. 4.
(6) (1868) 20 Q.B.D. 640.
(7) [1918] 1 K.B. 128.

It is unfortunate that the attention of the Bench deciding *Engineering Supplies Ltd.* v. *Dhandhania & Co.* (1), was not drawn to these decisions.

The decision in *Clarke Bros.* v. *Knowles* (2), was followed and the decision in *Engineering Supplies Ltd.* v. *Dhandhania & Co.* (1), was dissented from in *Ahmad Bux Alla Jovaya* v. *Fazal Karim* (3), and *Pokhar Mal Ram Nath* v. *Khanewal Oil Mills* (4).

In this state of the authorities, I am not inclined to extend the principle of the decision in *Engineering Supplies Ltd.* v. *Dhandhania & Co.* (1). That case is certainly an authority for the proposition that the offer is made where it is posted but it is no authority for the proposition that the notice is given at the place where it is posted.

Section 80 of the Code of Civil Procedure requires service of a notice in writing upon the defendant. The antecedent issue and posting of the notice are pieces of evidence necessary for proving the service of the notice but they are no part of the cause of action. The cause of action arises in part at the place where the notice is served and not at the place where it is issued and posted.

Accordingly, the claim under section 70 of the Indian Contract Act must fail on the ground that this Court has no jurisdiction to entertain such claim.

It is not, therefore, necessary to decide whether this claim is maintainable having regard to the decision in *Union of India* v. *Ram Nagina Singh* (2).

The suit is dismissed on the ground that this Court has no jurisdiction to entertain this claim. The defendant is entitled to costs of this suit.

Certified for two Counsel.

M. K. Ray Choudhury & Co.: Solicitors for the Appellant.

S. K. Mandal: Solicitor for the Defendant.

S.C.P.

Suit dismissed.

(1) (1930) I.L.R. 58 Calc. 539.
(2) [1918] 1 K.B. 128.
(3) [1940] I.L.R. Mad. 195.
(4) [1945] A I.R. Lah. 260.
(5) (1951) 89 C.L.J. 342.

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THE
CALCUTTA LAW JOURNAL

SHORT NOTES OF CASES, ARTICLES
AND OTHER MATTERS

Vol. 93

(January to June)

1954

CALCUTTA

CALCUTTA LAW JOURNAL LIMITED
8, Old Post Office Street

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REVIEWS.

The Foreign Exchange Regulation Act—By S. R. Vakil, B.A., LL.B., Attorney-at-Law, with an Introduction by Sir Jamshedji Kanga. Published by N. M. Tripathi Ltd., Bombay 2, Price Rs. 10/-.

Being a pioneer work in the field, Mr. Vakil deserves the praise of all for making the book self contained and incorporating therein all the relevant Rules and informations. The Act has adopted the Exchange Control Act, 1947, as the model and has followed the substance of the Engligh Act such such variations and modifications as the conditions in India require. The English Act, therefore, has also been reproduced in the Appendix to the book. The author has dealt the subject with clarity and in a manner easily understood by professional people and laymen alike. The publication will indeed, remove a long-felt want of the public.

The printing and get up are excellent.

H. N. G.

Industrial Law Digest—By Khare and Bhide, Published by N. M. Tripathi Ltd., Bombay 2, Price Rs. 10/-.

In these days of industrialisation of the economy of the Country, various laws are enacted from time to time for smooth working and harmonious relation between the employee and the employer, whether private enterprises or Government concerns. It is very difficult to keep oneself abreast with all the growing decisions. The Indian Law Digest along with the Digest of Decisions of the Labour Appellate Tribunal published earlier, presents the law to those concerned in a compendious form making available mostly all the important case laws on the subject.

The book consists of two parts—the first part consists of the decisions of the Labour Appellate Tribunal of India and the second part consists of the judgments of the Federal Court of India, Supreme Court of India and the High Courts in India from 1947. The book is an invaluable guide for these who have to deal with labour.

H. N. G.

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REVIEWS

The Factories Act by Jnanendra Nath Baksi and Jitendra Kumar Mitra, Advocates and published by Messrs. S. C. Sarkar & Sons, Limited, 1-C, College Square, Calcutta-12, 1953. Priced at Rs. 4/-.

This is the second volume of the learned author's projected series of publications on the labour legislation of the country. As an aid to a scheme of industrial expansion, a harmonious relationship between labour and capital, controlled and regulated by a Code of labour laws is indispensable and a clear understanding and appreciation of the different provisions of such a Labour Code and a dissemination of the knowledge thereof are equally necessary for the maintenance of that cordial relationship between the said two factors of industrialism. This being the position, the learned authors' endeavours in popularising factory law by writing out a commentary thereon will be received with an all-round acclamation and felicitation. The notes appended to the different sections of the Act are quite satisfactory from every possible aspect. They are all very precise and at the same time concise too. All that could be said or should be said by way of giving explanatory notes to the sections have

been included in the book with meticulous care and industry. The present Act being mainly based on the corresponding English statute, the learned authors have acted judiciously in making a comparative study of the subject with copious references to the English text and case-law. This will undoubtedly help a better understanding of the factory law as a whole. A succinct history of the development of factory legislation together with a complete analysis of the entire scheme of this statute has been given in the introduction of the book and the readers will find the same immensely helpful in interpreting and applying the law with reference to individual cases to be mooted in law Courts. On a perusal of this statute in the light of the case law clustering under it, it would strike one that in the interest of the factory labourers themselves and for the purpose of rectifying aberrations and derelictions of duty on their part and for the purpose of weding out the undesirable workers some corrective provisions should have been made in this statute reserving some fundamental magisterial powers in the factory owners themselves, but it is strange to note that the factory laws in this country as also abroad are conspicuous by the absence of any such reservations in favour of the factory owners It is desirable that the learned authors who are specialists in this branch of law should give out their well considered opinion regarding the ethics of the reservation of magisterial powers for the factory owners without which the conflict between labour and capital will ever remain a vexed problem to the great detriment of the industrial progress of the country The book has been neatly printed and given a very decent get-up. We recommend this book to all interested in it.

Registration law embodying the Indian Registration Act and other relevant statutory provisions by Mokshada Charan Bhawmik, published by S. Bhawmik of 5A. Annada Banerjee Lane, Calcutta-20, 1954. priced at Rs 10/-.

This annotated edition of the Indian Registration Act from the pen of Mr. Mokshada Charan Bhaumik, the reputed author of the Bengal Tenancy Act, is an exhaustive treatment of the law of Registration to be found not merely in the Registration Act but also in the other relevant statutes and statutory Rules. There has been raised quite a chorus of encomiums over this publication from the jurists and judges alike, and all the salient

features of the book in all their aspects have already been commended and eulogised from various quarters even before the publication itself could find enough opportunities to penetrate into the hands of the distant lawyers or be subjected to the test and trial of time and practical application; so, there is scarcely anything left now for the reviewer to say any more things in its praise except by way of unnecessary repetition. Suffice it for us to say here that the reputation which the learned author's very valuable commentaries on the Bengal Tenancy Act earned for him nearly quarter of a century ago, has been well maintained, fully re-affirmed and vindicated in this publication also. We have not the least doubt that the present publication also will maintain its place among the recognised and approved legal commentaries of the country, exactly in the same way as the learned author's aforesaid earlier publication did. We have read with absorbing interest the learned author's excellent criticism on the decisions reported in A.I.R. 1944 Cal. 89 (*vide* p. 47) and A.I.R. 1948 Cal. 53 (*vide* p. 227). The learned author's interpretation of the word "other" occurring in clause (b) of section 17(1) of the Registration Act and his bold stand by the overruled decision in A.I.R. 1944 Cal. 89 are clear proof of an exuberance and robustness of the legal spirits in him which can easily outlive dogmatism and legal cants. With respect to this controversy so raised by him, we would naturally expect the learned author to say something about the propriety of omission of clause (d) of Section 17(1) of the Act from Sub-section (2) thereof, wherein the other two clauses (b) and (c) have been specifically mentioned. We are apt to think that omission of clause (d) from Sub-section (2) of Section 17 is accidental and should be rectified by a suitable amendment but the legislative lethargy in the matter has been the root-cause of considerable unnecessary controversies in law Courts. Anyhow, in view of the keen research, the learned author has made in the law of registration, we have looked for solutions in his book for many of the knotty problems we have been confronted with from time to time. For example, a question arises whether the doctrine of *lis pendens* applies in relation to suits under Section 77 of the Registration Act. Similarly a question arises whether a compromise decree by which one contestant concedes a superior interest in his own property in favour of his opponent will require registration on the footing that the transaction amounts

to a lease, although outside the ambit or Section 105 of the Transfer of Property Act. For such vexed problems and similar other ones we naturally look to the learned author for guidance and we hope he would tackle all these problems in his next edition, which we have not the least doubt will appear ere long. The get-up of the book leaves nothing more to be desired and forms an additional attraction for it.

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ORIGIN AND GROWTH OF ANCESTOR WORSHIP.

NARENDRA NATH GUHA, *M.A.*, LL.B.
Advocate, High Court, Calcutta.

Primitive form of ancestor-worship described in the Rigveda. It occurs there in the most primitive form. The spirits of dead ancestors invoked to confer blessings, long life, etc. It was simple there. Pitris were invoked for the above mentioned purpose unlike the later ancestor-worship which is to confer spiritual benefit on the ancestors. In the Rigveda, pitris are mentioned in the plural and were invoked in general and not separately distinguished. In the White Yajurveda, four hundred years later, the pitris limited to three ancestors—father, grand-father and great grand-father. The word *Sraddha*—the ancestral sacrifice of later law-givers was never used. This word came into existence long after the Vedic ceremonial had hardened into shape.

Modern Sraddha distinguished from Vedic ancestor-worship. The word is not mentioned; the ancestral sacrifice is a daily sacrifice which is observed to this day. No doubt, *Sraddha* originated in Pitri Yajna, but is not identical with it. In the *Satapatha Brahmana,* Pitriloke is mentioned. The pleasures and gratifications spoken of with regard to the Pitris are all of a sensual kind. In the *Satapatha Brahmana,* however, we find thoughts in a different channel. Yajnavalkya's doctrine we meet with ideas of a transcendental nature, of which it is impossible to form a clear conception. The sublime mysticism of the later philosophers must owed its origin to the mystic doctrine of a future state propounded by Yajnavalkya. Yajnavalkya's ideas of the ancestral abode far less clear than the Rigveda Sutra period of Vedic literature 600-200 B.C. Gautama & Apastamva who flourished not later than the third century B.C. Gautama is older. The period of Brahmana intervened

between Sutra and Vedic hymns period. During this time the basis of another sacrifice was laid over and above the ancestral-sacrifice.

Kamya Sraddha—The spirits of the dead are solemnly invoked to bless the work which is about to be undertaken and to give strength to the performers to accomplish the object desired.

Ancestor-worship—Great importance has been attached by almost every nation to the obsequies of the dead, dictated in the first instance by love and affection, sanctioned afterwards by religious conviction and moulded into various forms by stubborn social necessity. It existed among the Greeks and the Romans, the ancient Persians and the Egyptians as well as among the Teutons and the Celts; and it is practised to this day by the modern Chinese and by all pious Hindus. Even the repressive influence of Christianity has not been able to stamp it out in civilised Europe. Everything whether in the form of flowers or *Pindas* or other things offered to the dead in token of love and affection is due to the more or less to the belief of ancestor-worship. Among the Roman Catholics, the chapels over the dead and the prayers to the dead may be viewed as only different shapes of ancestor-worship;—also the custom of feeding the spirits both annually and at other times;—All Souls' Day (day of supplication for souls of faithful deceased, Nov. 2nd) among the Teutons and Celts—the festivity to alleviate the sufferings of the souls in purgatory by prayers and alms-giving. The festival of All Souls corresponds to the *Pitri Pinda Yajna* of the Hindus.

Soul-Cakes—Village children in the West of England gather small contributions singing—*Soul-Cakes* correspond with the *pindas*. In Christian Europe there is severance of the legal and religious aspects of obsequial offerings. But still there are signs which lead us to suppose their connexion was inseparable at some time. *Frankal Moigne*—in Saxon England it was a tenure which a religious corporation held lands on condition of praying for the souls of the grantor and his heir. In the *Frankal Moigne* tenure lands, though leased for the purpose aforesaid, could not be taken away on failure of duties, likewise, a Hindu

heir is bound by law and religion to present *pindas* to the dead ancestor. But like the *Frankal Moigne* tenants an heir cannot be divested of the estate once vested in him on failure of performing the religious rites for the dead ancestor. Funeral expenses are treated as a privilege debt allowed before all other debts and charges, thus establishing a connection between the duties of performing the obsequies and the right of inheriting the property of a deceased relative. Among the Greeks, "Sepulchral duties" says Grote, "were sacred beyond all others in the eyes of a Greek." The dead had, as it were, a legal and a moral claim to obsequial rites. Among the Romans great care was taken by the civil law to make due provision for the performance of the sacra of the Romans—which were sacrifices and ceremonies held in honour of deceased ancestors. Provision for obsequial expenses was made indispensable in Rome; if no provision made it devolved on the heir. *Hindu custom.* "He who inherits the property" says Vishnu "shall also offer the funeral cake; a son must present the cake, even if he does not get any portion of his father's property." Likewise, was the son compelled to pay homage to his deceased father. The Hindu system laid it down as an imperative rule that a right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. Failing competent heir, this obligation extends to the king. Putting on *obolos* for *charon* into the mouth of the corpse among the Greeks corresponded to the Hindu custom mentioned in the Yajurveda of a placing a piece of gold in the open mouth of the deceased as if it may be, the fund for the journey about to be undertaken by the dead man. *Grecian rites described. Trita,* sacrifice offered to the dead on the third day, *ennata, tria-kadas, euagismeta* and *choai* —the principal sacrifice to the dead was on the 9th day called *ennata.* Mourning for the dead appears to have lasted till the 13th day after the funeral on which day sacrifices were again offered. *Choai* or tomb offerings. *Genesia,* offerings of garlands and flowers on the anniversary of the birth day of the deceased. *Nekusia*—offerings on the anniversary of the day of death when meals were presented to the dead and burnt. The Roman ceremonies were analogus. The sacred books of the Parsees prescribe five sacrifices among which the sacrifices for the souls of the dead resemble the *Sraddhas* of the Hindus. The Chinese funeral sacrifices have many points in common

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REVIEW.

The Law of Civil Procedure Code (in India & Pakisthan) by S. C. Sarkar, Third Edition, Published by Messrs. S. C. Sarkar & Sons Ltd., 1/C, College Square, Calcutta-12, 1954. Price Rs. 23/-.

This handy case-noted edition of the Civil Procedure Code by Mr. S. C. Sarkar is too well-known to the legal circles to require any introduction afresh. The utility of the publication has been fully established by the quick succession in which edition after edition of the book has been requisitioned and absorbed in the market. There is not much complexity in the provisions of this Code and whatever seeming omissions giving rise to complex problems were gradually discovered in them have since been more or less remedied by suitable amendments effected under the rule-making powers of the High Courts of the different States as given by Section 122 of the Code. Therefore the Code, as it stands now, is, except in respect of its discretionary provisions, a perfectly simple, intelligible and workable body of rules regulating the procedure to be adopted by the Courts in deciding cases. It is regrettable that a perfectly sensible and workable body of procedural laws have been rendered unnecessarily complicated and obstructive to administration of Justice by the importation of a number of equity rules and the application of a good many artificial cannons of interpretation in construing the simple provisions of a workable Code. Or, in other words, the Civil Procedure Code, which is a very simple subject in itself, has now become complicated because of its implementation by a number of legal ideas not embodied or to be found in it. For instance, it has been said that the Code is not exhaustive, although the residuary provision in its Section 151 would negative that idea. Similarly it has been said that its Section 115 is limited to a question of jurisdiction only or is inapplicable in the cases where other remedies are available

although the simple language of that section does not warrant such a wild view. The importation of the principle of *ejusdem generis* in its Order XLVII, Rule 1, would be another illustration in point. In this state of things, the learned author is absolutely justified in postulating that the Code is a complex subject and in proceeding to work on that hypothesis. This accounts for the compressed method adopted and the terseness of expressions employed in writing out annotations for the book, and we heartily congratulate the learned author upon the same. The book evinces an all-round endeavour on the part of the learned author to render real service to the legal profession by embodying in it all the essential informations that are worth knowing or being posted up with. If inspite of such attempt on the part of the learned author any reader of the book be disappointed in the matter of picking up his necessary information, or the desired reference, as for example, the case of *Umed Mal* (53 I.A. 271) or of *Chamaria* (1952 S.C.A. 775) under section 115 of the Code, it will all be a matter of accident to be written off and not one of omission to be debited against its merits. The point to be impressed on the readers is how far the publication is useful and not wherein it has stopped short in the matter of multiplying references. The get-up of the book, its neat priting, handy shape, are all well tuned up with the scheme of the publication and promise well to make it a complete success. In view of the increased cost of production brought about mainly by an oppressively rack-rating printers' association, the price of the book should not be considered immoderate.

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GOVERNMENT OF INDIA.

MINISTRY OF FINANCE (REVENUE DIVISION)

NEW DELHI, THE 2ND JUNE, 1954.

NOTICE

APPOINTMENT OF VALUERS UNDER SECTION 4(3) OF THE ESTATE DUTY ACT, 1953.

No. 5(3)-ED/54:—It is notified for general information that the Central Government proposes to appoint qualified persons as valuers under sub-section 3 of section 4 of the Estate Duty Act and also to fix a scale of charge for their remuneration.

2. The different kinds of properties of which valuation may be required to be made are broadly—

	Nature of property.	*Category of valuer.*
(1)	Immovable property.	Surveyor, Engineer, Architect or Mining Engineer for mines.
(2)	Stocks, shares and debentures of a company not quoted in a recognised Stock Exchange including shares and debentures of a controlled Company.	Accountant.
(3)	Share of a partner in a partnership.	,,
(4)	Business assets including good-will.	,,

5)	Jewellery, precious stones and ornaments.	Specialist in jewellery, precious stones and ornaments.
6)	Works of Art.	Specialist in work of Art.
7)	Reversions and interest in expectancy.	Actuary.

3. In order that a person may be eligible to be appointed as a valuer, he must satisfy the qualifications for any one of the different categories of valuers. The minimum qualification shall be as follows—

(1) *In the case of a Surveyor, Engineer, Mining Engineer or an Architect*:

(i) is a graduate in Civil Engineering, Mining Engineering or Architecture of a recognised university or is a member of a recognised Institute of Engineers, Architects, Surveyors or of School of Mines whose diploma is recognised as being equivalent to a degree in engineering, and

(ii) has been in practice as consulting engineer, mining engineer, surveyor or architect for not less than ten years.

N.B.—In the case of a person who is or had been in the service of a State or Central Government, the period of ten year's continuous service as a Gazetted officer, shall for this purpose be treated as equivalent to ten years' practice and in the case of a person in the service of the Valuation department of a statutory Improvement Trust or a Municipal Corporation, ten years' service as member of the executive staff, shall be regarded as satisfying conditions Nos. (i) and (ii).

(2) *In the case of an Accountant*—

(i) is a member of the Institute of Chartered Accountants of India, and

(ii) has been in practice as an accountant and auditor for a period of not less than ten years and has the annual audit work of at least 25 partnership concerns and limited companies employing an aggregate working capital of 50 lakhs in the business in India, or if he is a

partner in a firm consisting of two or more partners and at least two of the partners satisfy the condition of 10 years' practice, the firm has the audit work of 50 concerns employing a capital of not less than 1 crore in the business in India.

N.B.—In the case of a person who is or had been in the service of a State or Central Government or a Municipal Corporation, ten years' continuous service connected with the audit and accounts or taxation work shall be regarded as satisfying the preceding condition No. (ii).

(3) *In the case of a specialist in jewellery, precious stones and ornaments*—

is engaged in the business of jewellery, precious stones or ornaments for a period of not less than 15 years and has an average annual turnover of not less than 20 lakhs in respect of jewellery or 50 lakhs in respect of bullion for the last three years.

(4) *In the case of a specialist in work of Art*—

is a member of the Council of National Art Gallery, or is Principal of a Government School of Arts, or is Trustee of National Museum, or was in the service of a State or Central Government as a Gazetted officer for not less than ten years in the Department of Archaeology.

(5) *In the case of an Actuary*—

(i) is a graduate of a recognised university.

(ii) is a member of any Institute of Actuaries which entitles him to act as an actuary for an insurance company incorporated in India.

(iii) has been in practice as an actuary for not less than ten years.

N.B.—In the case of a person who is or was in the service for not less than ten years, of a State or Central Government or of an insurance company having an annual premium income of 20th lakhs, the period of ten years' service shall be treated for this purpose as equivalent to ten years' practice.

4. Any person who fulfils the qualifications set out above for any one of the category of valuers and who wants to have his name considered for appointment as a valuer may apply to the

Deputy Secretary to the Government of India, Ministry of Finance, Revenue Division, New Delhi. For the first list applications setting out the applicant's qualifications supported by attested copies of the necessary documents should reach the Deputy Secretary before the 13th of July, 1954. In the case of a person in the service of a State or Central Government or a statutory corporation, the application should be forwarded through the employer, who should clearly state that he has no objection to the applicant's appointment as a valuer, and his undertaking such valuation work.

5. On receipt of an application, the Central Government may require any other information to be furnished or may cause such enquiries to be made as it deems fit.

6. Further names of valuers may be added in the list on the 1st of January and the 1st of July in each year.

7. (1) The appointment of valuers shall, in the first instance be for a period of three years and every person whose name is included in the first list shall have to apply again, subject to his satisfying the requisite qualifications to be then specified, in the beginning of the financial year 1957-58 if he wants to have his name included in the subsequent list.

(2) The Central Government may remove the name of any person from the list of valuers if it finds him guilty of misconduct in connection with any valuation proceedings.

8. The scale of charges fixed for the remuneration of valuers is as under and it shall not be permissive for any valuer whose name is borne on the list to charge fee and a scale higher than the prescribed scale:—

Scale of charges.

For any property upto Rs. 50,000 ...	½ per cent.
On value of property exceeding Rs. 50,000 but not exceeding Rs. 1½ lakhs	¼ per cent.
On the balance	⅛ per cent.

Sd. R. K. DAS,

Deputy Secretary to the Government of India.

The Calcutta Law Journal

Vol. 93 | CALCUTTA | 18n

DEVOLUTION OF SHEBAITI— IS IT AN IMMOVEABLE PROPERTY?

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We guess that the principle underlying the Hindu Law of Succession has lent a complexity, slight though it be, to the first part of the subject-matter while the *bona fide* doubt over the second-half of the same subject-matter has made the application of some of the Articles of the Limitation Act in particular cases a bit difficult. Both these points cropped up very lately in the case of *Kalipada Chakraborti* v. *Palani Bala Devi* (1) and the Hon'ble Mr. Justice Mukherjea has solved both these difficulties following certain well-defined lines which although very clear take up in our minds some straggling thoughts and side-issues which it is somewhat difficult for us to completely ignore. So far as the first part of the question is concerned, it arose in this way in the aforesaid case. There was an adverse possession so far as the previous female shebait was concerned. Would that adverse possession by a stranger run counter to the reversioners plaintiffs also, who on the death of the female shebait claimed back the said *shebaiti* from the trespasser? It has been held that the reversioners are not affected thereby and the reason that has been furnished is that under the ordinary Hindu law of succession, the reversioners on the death of the previous female owner really claim the property *from and through the last male heir*. This position, if Hindu law strictly applies, is inevitably true. Hindu law, it cannot be gainsaid, suggests the line of succession in the case of *shebaiti* also; but are the lines *in pari materia* with each other when they are affected with the element of adverse possession? Or, in other words, is the same principle of inheritance applicable alike in both cases? If *shebaiti* is, as has been held, an hereditary office,

(1) [1953] S.C.A. 171.

may it not form a rigid link in the matter of succession thereof, each link in the chain depending for its solidarity upon each other and all, and that if there is a rift in the *shebaiti* somewhere is it not probable that the whole compactness of the chain would break? It seems that the element of adverse possession although it might not affect the elasticity of the ordinary succession in Hindu law might have a tendency to break the entire rigidity and compactness of an hereditary office like the *shebaiti*. The reason it may be submitted is, that in case of ordinary succession the reversioners' right of claim arises on the *death* of the widow while in case of a devolution of *shebaiti* it is the *cesser* of the office, the mantle in the latter case falling upon the successive heirs equally irrespective of how they have come to inherit. This mode of approach may be made to rest on the principle part-enunciated in the sundry decisions clustering round the topic, that the reversioners after all, claim the inheritance of a *shebaiti from the Founder* and through the widow although they may not claim property through a previous female heir but *from and through the last male heir* in case of ordinary law of succession. If such a difference in principles be at all conceived, then may it not be argued that the question of adverse possession would take different complexions in the two cases? This possible difference in principles in the two cases, seems not to have been argued before the Supreme Court and consequently stress seems to have been laid upon the property-rather than the office-element in a *shebaiti*.

Next, the question arose in the same case as to the proper Article of the Limitation Act to be applied in case a reversioner plaintiff claims back the *shebaiti* from a stranger who has adversely possessed it against the previous female shebait. The Hon'ble Mr. Justice Mukherjea has observed that as there is some difficulty in comprehending the exact nature of the property conceived in a *shebaiti*, the application of Article 141 is rendered doubtful and accordingly he has applied Article 124 of the Limitation Act in the said case. There would have been no *locus pœnitentiæ* if the learned Judge had solved all doubts on the matter and come to the conclusion he arrived at after holding that the property comprised in the *shebaiti* relates to moveables alone. As the point has been left in dark we can only grope about and ask the question to ourselves as to what would have

been the results if after a thorough enquiry and removal of doubts it appeared that the *shebaiti* is a complex property or taking the extreme view consists of immoveables only? Would either of the conclusions have induced a change in the application of the proper Article of the Limitation Act? We think, a change might have been possible. In applying Article 124 instead of Article 141, the office-element in the *shebaiti* seems to have been stressed upon instead of the property-element inherent in it.

It may be submitted here, that in the cases of *Runchordas* v. *Parvati* (1) and *Jaggo* v. *Utsava* (2), the Article that was applied was 141 of the Limitation Act and not Article 124 there being no complication introduced by a *shebaiti*. *Semble,* in the case of *Gnanasambanda* v. *Velu* (3), relied upon by the Hon'ble Mr. Justice Mukherjea, although Article 124 of the Limitation Act was applied there was no complication of the plaintiff bringing a suit for possession against a trespasser who had adversely possessed against *a previous female shebait.* So that in all these cases referred to, there seemed to be no great obstacle in applying the principle of the ordinary Hindu law of succession and the observations of the Judicial Committee in the last-mentioned case, also quoted in the judgment of the Hon'ble Mr. Justice Mukherjea, therefore seem to be denude of any special force and significance so far as the principle of succession in the case of a *shebaiti* is concerned.

Our labours would not be wholly unprofitable if we make an attempt to probe into the nature of property imbedded in the conception of a *shebaiti.* That it is an office in a pre-eminent degree is undoubted. That it is also a property is also true. We can hardly make any distinction between office and property so far as the *shebaiti* is concerned: *Gnanasambanda* v. *Velu* (3), Property is a fragment of the connotation of office and a reflex of ownership. The incorporeal rights attached to the office have only an objective form denoted by property and nothing more. As such the duties attached to the office may be dispensed with and we may concentrate on the

(1) (1898) L.R. 26 I A. 71.
(2) (1929) L.R. 56 I.A. 267.
(3) (1899) L.R. 27 I.A. 69.

rights alone pointing to a *dominium*. As far as the *debutter* estate is concerned these rights of *dominium* must have to be exercised by the shebait with an *animus sibi habendi* in order to make it or part of it his property. That being so, a shebait's rights attached to his office are naturaly differentiated from those of the *idol* who, although unable to perform a juristic act except through the human agency of a shebait, is nevertheless the true owner in the eye of law. Necessarily, a shebait's rights of a *dominium* get restricted in a peculiar way in this peculiar religious institution prevailing in our country, and give us a glimpse as to the nature of the property imbedded in the conception of a *shebaiti*. The landed estate appertaining to a *debutter* belongs to the *idol* in absolute ownership. A shebait has no concern in it except as a manager; the rents, malikanas and profits that accrue from the immoveable or other properties of the deity are also His and to be spent for His worship or in furtherance of the debutter estate. Where is then the scope of the shebaits' rights of *dominium*? What are those properties which the shebait can claim and deal with as his own? Yet it is true, that there must be some properties imbedded in the very conception of a *shebaiti*. In the strict eye of law we see nothing but duties attached to the office but there are decisions of courts which go to the length of saying that a shebait has rights to the offerings made to the deity although these rights may be said to be equitable in character. So the properties conveyed by the notion of a *shebaiti* may be said to be at the most moveable in character and as such Article 141 of the Limitation Act has no room for application on that score also.